84-1840

No. .....

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In The
Supreme Court of the United States
October Term, 1984

LONNIE M. WOODRUM,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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137 P

QUESTIONS PRESENTED

I. Whether The United States District Court Has Subject Matter Jurisdiction Under 45 U.S.C. § 153 First (q) (1982) To Grant Relief From The Order Of A Public Law Board Upholding The Railroad's Decision To Terminate An Employee For Failure Of That Order To Conform Or Confine Itself To Matters Within The Scope Of The Public Law Board's Jurisdiction Where That Order Is Alleged, And In The Context Of The Railroad's Motion For Summary Judgment Must Be Presumed, To Be Based Wholly On False Testimony Procured By The Railroad.

II. Whether The United States District Court May Entertain An Independent Action In Equity, As Described In The First Saving Clause Of Fed. R. Civ. P. 60 (b), To Relieve An Employee From An Order Of A Public Law Board Upholding The Railroad's Decision To Terminate That Employee Where That Order Is Alleged, And In The Context Of The Railroad's Motion For Summary Judgment Must Be Presumed, To Be Based Wholly On False Testimony Procured By The Railroad.

III. Whether The United States District Court May Entertain An Action To Set Aside As A Device Prohibited By § 60 Of The Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1982), The Discharge By The Railroad Of An Employee Where That Discharge Is Alleged To Be Based On False Testimony Suborned By The Railroad And The Employee Brings His § 60 Action Within 3 Years Of The Date When He Learned Of The Device.

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*Pursuant to Supreme Court Rule 21.1(b), Petitioner shows that the caption of the case in this Court contains the name of all parties.

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Petitioner, Lonnie M. Woodrum, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 15, 1985, rehearing denied on February 22, 1985.

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OPINIONS BELOW

The following are reproduced in their entirety in the Appendix:

Opinion of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the United States District Court for the Middle District of Georgia and dated January 15, 1985, 750 F.2d 876 (11th Cir. 1985). (App. A)

Letter from L. H. Smith, Jr. (Superintendent, Southern Railway System) notifying Woodrum that he was dismissed from the service of Southern Railway System and dated May 16, 1978. (App. B)

Letter from L. H. Smith, Jr. (Southern Railway System) to W. W. Long (Local Chairman, Division 786, Brotherhood of Locomotive Engineers) declining Woodrum's appeal and dated July 29, 1978. (App. E)

Letter from H. R. Moore (General Manager, Eastern Lines, Southern Railway System) to C. H. Dickenson (Brotherhood of Locomotive Engineers) declining Woodrum's appeal and dated September 15, 1978. (App. H)

Award of Public Law Board No. 1261 denying Woodrum's claim for restoration to service, etc., and dated July 30, 1979. (App. K)

Opinion of the United States District Court for the Middle District of Georgia granting Summary Judgment in favor of Defendant Southern Railway Company on all of Plaintiff Woodrum's claims and dated September 12, 1983, 571 F. Supp. 352 (M.D. Ga. 1983). (App. L)

Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the United States District Court for the Middle District of Georgia and entered January 15, 1985. (App. M)

Order of the United States Court of Appeals for the Eleventh Circuit denying Appellant Woodrum's Petition for Rehearing and Suggestion of En Banc Consideration, and dated February 22, 1985, 756 F.2d 885 (11th Cir. 1985). (App. N)

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JURISDICTIONAL STATEMENT

On May 16, 1978, after an investigation hearing "on the property,"[1] Petitioner was dismissed from employment with Respondent railroad. Petitioner pursued his administrative remedies and eventually appealed to Public Law Board No. 1261. On July 30, 1979, the Board upheld the dismissal.

Petitioner filed an action seeking to set aside the order of the Board in the United States District Court

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[1] An investigation hearing "on the property" is an investigation conducted by the railroad. Witnesses for both the railroad and the employee may appear. Their testimony is not sworn.

for the Middle District of Georgia on June 5, 1981.[2] By order dated September 12, 1983, the district court denied Petitioner's claims for relief and granted Respondent's Motion for Summary Judgment in all respects. Summary judgment was entered on September 13, 1983. Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on October 11, 1983.

On January 15, 1985, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court. Petitioner filed his Petition for Rehearing and Suggestion of En Banc Consideration in the United States Court of Appeals for the Eleventh Circuit within twenty days, as required by the 11th Cir. Rule 26(b). By order dated February 22, 1985, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's Petition for Rehearing and Suggestion of En Banc Consideration.

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. § 1254(1) (1982).

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[2] 45 U.S.C. § 153 Second (1982) provides for the establishment of special boards of adjustment to resolve disputes otherwise referable to the National Railroad Adjustment Board. These boards are composed of a carrier representative, an employee representative and a neutral third person selected by the first two. These boards are commonly known as Public Law Boards. Their awards are enforceable and reviewable in the same manner as the awards of the National Railroad Adjustment Board, i.e., pursuant to 45 U.S.C. § 153 First (q). *DiBlasi v. Baker*, 404 F. Supp. 654, 655 (D. Mass. 1974), *aff'd*, 539 F.2d 702 (1st Cir. 1976).

STATUTORY PROVISIONS INVOLVED

The Railway Labor Act § 3 First (q), 45 U.S.C. § 153 First (q) provides:

> If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court

shall be subject to review as provided in sections 1291 and 1254 of Title 28.

* * * * *

Fed. R. Civ. P. 60(b) provides:

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in

Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

* * * * *

The Federal Employers' Liability Act § 10, 45 U.S.C. § 60 (1982) provides as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.
>
> If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or

circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

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STATEMENT OF THE CASE

This case involves an engineer, Petitioner Woodrum ("Woodrum"), who was discharged by Respondent Southern Railway Company ("Southern"), on charges of disloyalty on the basis of unsworn testimony given at an investigation hearing "on the property."[3] Woodrum unsuccessfully pursued his administrative remedies pursuant to the applicable collective bargaining agreement and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982), and his discharge was upheld by Public Law Board No. 1261. Approximately two years after Woodrum's discharge, the witness whose testimony had formed the basis of the dismissal recanted that testimony, and, in a sworn statement, revealed for the first time that Southern had procured the false testimony that was adverse to Woodrum. Woodrum thereafter sought unsuccessfully to have the Public Law Board's decision affirming his dismissal set aside by the United States district court. Having been denied relief in the United States Court of Appeals for the Eleventh Circuit as well, Woodrum now petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The controversy presented to this Court is whether the United States district

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[3] See note 1, *supra*.

court has jurisdiction to grant relief from the Public Law Board's decision upholding Woodrum's dismissal (1) through the avenue of judicial review provided by 45 U.S.C. § 153 First (q) (1982), § 3 First (q) of the Railway Labor Act; (2) in an independent action in equity as described in the first saving clause of Fed. R. Civ. P. 60(b); or, (3) by way of a private cause of action under 45 U.S.C. § 60 (1982), § 10 of the Federal Employers' Liability Act.

On April 27, 1978, Southern notified Woodrum that on May 1, 1978, it would investigate a charge against Woodrum of "conduct disloyal and unbecoming an employee in that (1) you arranged for a meeting between Eddie Lee Robinson, a Switchman injured while on duty at Macon, Georgia, on March 9, 1978, and Plaintiff attorney Frank Burge for the purpose of having Mr. Robinson retain such counsel in a suit against the Carrier under the Federal Employers' Liability Act, and (2) that you personally took Robinson to a hotel suite at the Hilton Hotel in Macon to meet with Mr. Burge for that purpose on or about March 15, 1978." (Record at 94, 375, 532-33; Appendix Q.)[4]

Thereafter, L. H. Smith, Superintendent of Southern Railway System, conducted an investigation hearing at which Robinson and W. B. Piper (a claim agent for Southern) testified on behalf of Southern. Woodrum and two other Southern employees, Nobles and Reid, testified on Woodrum's behalf. The witnesses were not sworn. (Record at 103-117.) The notarized statement of Attor-

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[4] The citations to the Record refer to the Record on Appeal in the United States Court of Appeals for the Eleventh Circuit.

ney Burge was read into the record. (Record at 150-152; Appendix P.) The accounts of the conversation between Woodrum and Robinson and their subsequent meeting differed markedly.

Robinson testified that during their telephone conversation, Woodrum told him that Burge would be in town, that Woodrum thought Robinson needed to go see Burge, and that Robinson should be at the Hilton Hotel in Macon at 2:30 p.m. He further testified that Woodrum met him in the hotel lobby and escorted him upstairs to Burge's room. Robinson also testified that Woodrum thereafter wrote his name and number on Burge's card and told Robinson that if he needed him at any time before Burge contacted him, he should contact Woodrum. Robinson testified further that he was tricked into signing papers authorizing Burge to sue the railroad in his behalf, that he had no knowledge of the suit Burge later filed in his behalf, and that he did not hire Burge as his lawyer. (Record at 94, 113-35, 375.)

Piper's testimony consisted entirely of a hearsay account of Robinson's conversation and subsequent meeting with Woodrum as allegedly told to Piper by Robinson. (Record at 94, 103, 107-13, 375.)

Woodrum testified that after he learned that Robinson had been hurt while working as part of the crew on a train on which Woodrum was the engineer, Woodrum called Robinson to find out whether he had done anything to cause Robinson's injury. During the conversation, Robinson described his unsuccessful efforts to work out his injury claim with the railroad and Woodrum testified that he replied:

> I said Mr. Robinson I cannot tell you what to do about it—I'm no attorney—my attorney will be in town and he would be glad to talk to you. He said who is he Mr. Burge. I said that's right. He said where's he gonna be at. I said the Hilton Hotel about 2:30 this afternoon.

Woodrum testified further that he went to the Hilton Hotel by himself for his appointment with Burge and that he met Nobles, Reid and Burge there. He testified that the four of them went up to Burge's room. While they were in Burge's room, the telephone rang. Burge answered and told the caller to come up. Robinson then appeared. (Record at 136-137.) Woodrum testified further that he was not soliciting for Burge (Record at 144) and that he did not advise Robinson to see any attorney. (Record at 147.)

Burge's notarized statement corroborated Woodrum's testimony that Woodrum did not escort Robinson to the meeting with Burge. Burge also stated that Robinson signed a contract of employment with Burge during their meeting and that Burge told Robinson he would handle his case for a 25-percent contingent fee. (Record at 150-52.)

Reid and Nobles corroborated Woodrum's and Burge's testimony that Burge, Woodrum, Reid and Nobles were all in Burge's hotel room at the time that Robinson arrived and that Woodrum did not take Robinson to the Hilton Hotel. (Record at 103, 153-56.)

Woodrum was notified by letter dated May 16, 1978, that the evidence adduced in the investigation showed that he was guilty as charged and that he was dismissed from Southern's service. (Record at 178; Appendix B.)

Shortly before May 20, 1980, Robinson contacted Woodrum and acknowledged that he (Robinson) had testified falsely at the investigation hearing and revealed that his false testimony had been coerced and procured by Southern through Piper. (Record at 95.) In a sworn statement, Robinson gave details of Southern's procurement of his false testimony, stated that he did not tell the truth at the investigation, and admitted that he had in fact gone up to Burge's room at the Hilton on his own and found Woodrum there and that he had hired Burge to handle his two claims. (Record at 342-70; Appendix O.)

Woodrum filed his Complaint in the United States District Court for the Middle District of Georgia on June 5, 1981. Among other things, he asked the court to set aside the order of the Public Law Board pursuant to (1) the court's judicial review power under 45 U.S.C. § 153 First (q) (1982); (2) the court's inherent equitable power, as described in the first saving clause of Fed. R. Civ. P. 60(b); and (3) a private right of action under 45 U.S.C. § 60 (1982). The district court held that it did not have jurisdiction to review the decision of the Public Law Board under 45 U.S.C. § 153 First (q), that it did not have jurisdiction to entertain an independent action in equity to relieve Woodrum from the award of the Public Law Board, and that any § 60 action was time-barred. The court granted summary judgment for Southern on all claims. That judgment was entered on September 13, 1983.

Petitioner filed his notice of appeal to the United States Court of Appeals for the Eleventh Circuit on October 11, 1983. In an opinion dated January 15, 1985, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court that there

was no jurisdictional basis for the court to set aside the order of the Public Law Board. In its opinion, the court of appeals noted that the district court judge was "obviously disturbed by the case" and expressed its own concern about the adequacy of the procedure before the Public Law Board: "We do not of course award accolades to the Railway or to the board for their handling of this case, and could we discover jurisdiction, our disposition would no doubt be different." 750 F.2d at 884. Woodrum's timely Petition for Rehearing and Suggestion of En Banc Consideration was denied by the United States Court of Appeals for the Eleventh Circuit by Order dated February 22, 1985.

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REASONS FOR ALLOWING THE WRIT

Introduction

Under the facts assumed by the district court on the Railroad's motion for summary judgment, Petitioner was terminated from his employment on the basis of false testimony procured by the railroad. With this false testimony, the railroad supported charges enabling it to discharge Petitioner under the applicable collective bargaining agreement. The refusal of the lower court to grant relief confers absolute immunity upon the railroad from judicial scrutiny of its fraudulently procured discharge of the Petitioner. The result is that the conduct of a party to a statutorily required administrative proceeding, which does not even include the safeguard that testimony must be under oath, cannot be assailed no mat-

ter how heinous the conduct or how unfair the result of such conduct.

This result occurs despite the fact that the district court had available to it three means of affording relief: (1) the avenue of judicial review provided under 45 U.S.C. Section 153 First (q) (1982); (2) the independent action in equity described in Fed. R. Civ. P. 60(b); and (3) a private right of action on behalf of Petitioner under 45 U.S.C. § 60 (1982). In refusing to grant relief by any of these three means, the lower court has decided important questions of law that have not been settled by this Court. The lower court has attemped to strike a balance between the need for finality and the need for judicial review in the context of the Railway Labor Act's procedure for resolution of disputes between carriers and employees. The appropriate balance between these competing values, however, should be struck by this Court because that balancing significantly affects the administration of that Act's dispute resolution provisions.

I. The Decision Below Vitiates The Judicial Review Provisions Of The Railway Labor Act; Creates An Apparent Conflict Both Within The Eleventh Circuit Court Of Appeals And Among Other Courts of Appeal As To The Proper Interpretation Of 45 U.S.C. Section 153 First (q); And Produces A Shockingly Wrong Result.

While the scope of judicial review under the Railway Labor Act is narrow, *see Union Pacific Railroad v. Sheehan*, 439 U.S. 89 (1978), the district court had available to it a jurisdictional basis under the Act that falls within this narrow scope. The district court had jurisdiction to review the Public Law Board's order terminating Peti-

tioner because the Board's order failed to conform or confine itself to matters within the scope of the Board's jurisdiction. In *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970), the Fifth Circuit Court of Appeals held that review by a district court of a National Railroad Adjustment Board award was proper to determine whether the award was "actually and indisputedly without foundation in reason or fact." An award or order without foundation in reason or fact is beyond the jurisdiction of the Board[5] and will, therefore, be set aside by the court pursuant to 45 U.S.C. § 153 First (q). *Accord, Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970). This is the rule in the Ninth and Seventh Circuits as well. *International Association of Machinists and Aerospace Workers, District Lodge No. 19 v. Southern Pacific Transportation Co.*, 626 F.2d 715 (9th Cir. 1980); *Kotakis v. Elgin, Joliet & Eastern Railway Co.*, 520 F.2d 570 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975); *Laday v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 422 F.2d 1168 (7th Cir. 1970).

The legislative history of the 1966 amendments adding the provisions for judicial review of § 153 First (q) demonstrates that Congress intended for the court to decline to enforce an award of a Public Law Board that is without foundation in reason or fact. *See* S. Rep. No. 1201, 89th Cong. 2d Sess. ——, *reprinted in* 1966 U.S. Code Cong. & Ad. News, p. 2285, *et seq.*, which reads in pertinent part on page 2287 as follows:

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[5] See note 2, *supra*.

> The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award 'arbitrariness or capriciousness' on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power. The limited grounds for judicial review provided in H. R. 706 are the same grounds that are provided in section 9 of the Railway Labor Act and also Public Law 88-108, which provided arbitration for the so-called work rules dispute.

In applying the "without foundation in reason or fact" standard of judicial review, a district court must consider not only the wording and purpose of the collective bargaining agreement, but also whether the conduct of the parties, in light of that agreement, supports the Board's order. *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403, 414 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970). The Board is required to interpret the provisions of the collective bargaining agreement in the context of a particular factual situation. While it is not the function of a district court to review an order of the Board to determine whether it is supported by substantial evidence, it *is* the function of a district court to set aside such an order where there is *no* evidence to support it.

There is no dispute at this point in the litigation that under the applicable collective bargaining agreement, Petitioner was properly dismissed if the charges originally brought against him were true. Under *Brotherhood of Railroad Trainmen, supra,* however, the Board's order must be set aside if it has no factual foundation. Robinson's recantation, if true, deprives the Board's order of any factual foundation.

The decision of the Board was based entirely on the evidence adduced at the investigation "on the property" before Superintendent Smith. (Record at 524, 533). The only evidence supporting the determination that Petitioner was guilty as charged came from Robinson, either directly through his testimony, or through the hearsay testimony of Piper, describing what Robinson allegedly told him. If Robinson's story was, in fact, false, then there was no factual foundation whatsoever for the decision to terminate Petitioner.

Petitioner, as the non-moving party in Southern's Motion for Summary Judgment, was entitled to have Robinson's recantation treated as truthful. *Griffis v. Delta Family-Care Disability and Survivorship Plan,* 723 F.2d 822 (11th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 3514 (1984). The district court, faced with this issue of fact on Southern's Motion for Summary Judgment, should have treated Robinson's recantation as truthful, at least for the purpose of assuming jurisdiction to review the Board's decision to determine whether it had a foundation in fact.

The holding of the lower court deprives Woodrum of an avenue of judicial review to which he is entitled under the Railway Labor Act according to *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.,*

415 F.2d 403 (5th Cir. 1969), *cert. denied,* 396 U.S. 1008 (1970), as reaffirmed in *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228 (5th Cir. 1970); *International Association of Machinists and Aerospace Workers District Lodge No. 19 v. Southern Pacific Transportation Co.,* 626 F.2d 715 (9th Cir. 1980); and *Laday v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 422 F.2d 1168 (7th Cir. 1970), as reaffirmed in *Kotakis v. Elgin, Joliet & Eastern Railway Co.,* 520 F.2d 570 (7th Cir.), *cert. denied,* 423 U.S. 1016 (1975). It does so because, by making the factual basis of an order of the Board unreviewable where the order is based entirely on the story of a single witness (as told directly by him or, as hearsay, by others), the decision of the lower court removes the requirement that for an order of the Board to conform to matters within the scope of the Board's jurisdiction, that order must rest upon a foundation in fact. This decision thus appears to conflict with the approach to judicial review of Board orders that the Fifth, Seventh, Ninth and Eleventh[6] Circuits have endorsed.

If the order of the Public Law Board is permitted to stand, in spite of the fact that the critical witness later testified under oath that he had previously testified falsely and that Southern procured the false testimony, no court can ever make the determination whether there was a factual basis for Petitioner's dismissal and whether the

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[6] In *Bonner v. City of Prichard, Alabama,* 661 F.2d 1206 (11th Cir. 1981) (en banc) the Eleventh Circuit Court of Appeals held that decisions of the U.S. Court of Appeals for the Fifth Circuit as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit.

Board acted within its jurisdiction. The result will be to encourage procurement by the railroad of fabricated testimony that satisfies the criteria necessary under the applicable collective bargaining agreement in order to rid itself of troublesome employees. Similarly, the decision encourages employees to suborn false testimony. In the name of giving deference to the powers of Public Law Boards, the lower court has abdicated its responsibility to ensure that such Boards confine their decisions to the jurisdiction conferred upon them. Petitioner respectfully submits that the requirement that the decision of a Public Law Board have a foundation in fact should be reinstated by this Court.

II. The Decision Below Improperly Constricts The Avenues Of Relief Authorized And Preserved By Fed. R. Civ. P. 60(b) And Thus Results In Significant And Recurring Problems Concerning The Application Of Rule 60(b) And The Availability Of The Remedies It Authorizes.

The district court has independent equitable jurisdiction to grant relief from the order of the Public Law Board for fraud in its procurement. The first saving clause of Fed. R. Civ. P. 60(b) expressly preserves the power of a federal court to entertain an independent action to relieve a party from a judgment, order or proceeding. The purpose of this provision "is to preserve intact and unimpaired the inherent power of the courts to entertain remedial actions for relief against judgments traditionally recognized at common law...." *Oliver v. City of Shattuck*, 157 F.2d 150, 152 (10th Cir. 1946). An independent action in equity is an appropriate vehicle for relief from fraud. *Winfield Associates, Inc. v. Stoneci-*

pher, 429 F.2d 1087 (10th Cir. 1970). While the Railway Labor Act itself permits a court to grant relief for fraud only in the limited circumstances where there is "fraud or corruption by a member of the division making the order," 45 U.S.C. § 153 First (q) (1982), Petitioner submits that he is entitled to bring an independent action in equity, as described in the first saving clause of Fed. R. Civ. P. 60(b), to obtain relief from the order of the Public Law Board on the ground that it was obtained by fraud. *See generally* 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2868 (1973) and 7 J. Moore, *Moore's Federal Practice,* Par. 60.36 *et seq.* (2d ed. 1985).

A United States district court possesses the independent substantive equitable jurisdiction to grant relief in an independent action. *See, e.g., Bankers Mortgage Co. v. United States,* 423 F.2d 73, 78-9 (5th Cir.) *cert. denied* 399 U.S. 927 (1970), quoting 7 Moore's Federal Practice § 60.36. Although the policy favoring finality of judgments is strong, it is not absolute. *See Bros Inc. v. W. E. Grace Manufacturing Co.,* 320 F.2d 594, 610 (5th Cir. 1963). A court entertaining an independent action for relief from an order must make "a delicate adjustment between the desirability of finality and the prevention of injustice." *Casco Chemical Co. v. Superintendence Co., Inc.,* 335 F.2d 645, 651 (5th Cir. 1964).

The lower court's view that there was no adequate jurisdictional basis for the grant of relief in an independent action is incorrect. If an independent basis of federal jurisdiction was needed, the district court had subject matter jurisdiction enabling it to exercise these equitable powers on the basis of either diversity or federal question jurisdiction. The allegations in Petitioner's

amended and recast complaint, if proven, would establish that the district court had subject matter jurisdiction on the basis of diversity. In the alternative, Petitioner avers that an independent action to obtain relief from the order of a Public Law Board is founded in federal question jurisdiction. Review of a Board order involves the validity of the decision of a body created by Congress to resolve disputes between the railroad and its employees in accordance with federal law that preempts resort to state law for resolution of such conflicts. *See* 45 U.S.C. § 153 (1982). Such an action, therefore, presents a federal question which endows the district court with subject matter jurisdiction. *See generally* 7 J. Moore, *Moore's Federal Practice,* paragraph 60.36 to 60.40 and particularly paragraph 60.38 [1] at p. 60-401 (2d ed. 1985).

Moreover, the order of a Public Law Board is the type of "judgment, order or proceeding" from which relief can be granted in the independent action described in the first saving clause of Rule 60(b). In *Merit Insurance Co. v. Leatherby Insurance Co.,* 714 F.2d 673 (7th Cir.), *cert. denied* — U.S. —, 104 S. Ct. 529 (1983), the Seventh Circuit Court of Appeals reviewed the order of a district court that, pursuant to motion under Fed. R. Civ. P. 60(b), had set aside an arbitration award. Although the court of appeals reversed the district court's order, it did so because the appellee had failed to make out its required case under Rule 60(b)(6) and *not* because the arbitrator's award was not the kind of decision from which relief is available under Rule 60(b). Implicit in the holding of *Merit,* therefore, is the assumption that an arbitrator's award *is* a proper subject of relief under Rule 60(b). *Merit* thus supports Petitioner's position that an

award of a Public Law Board, a decision-making body much like the arbitration panel in *Merit, see* 714 F.2d at 676, is a proper subject for relief in the independent action described in the first saving clause of Rule 60(b).

The lower court did not support its view that Rule 60 does not apply to orders of Public Law Board by any citation to authority. The court apparently relied upon its view of the importance attached by Congress to finality of Board decisions.

Petitioner submits, however, that the provisions of Rule 60 are self-limiting in that they require an extraordinary showing and the rule, thus, does not permit easy disruption of final decisions. *Carr v. District of Columbia,* 543 F.2d 917, 927 (D. C. Cir. 1976). Where the requirements justifying relief are met, *see, e.g., Winfield Associates, Inc. v. Stonecipher,* 429 F.2d 1087, 1090 (10th Cir. 1970), an independent action should be available as an avenue of extraordinary relief from the decision of the decision-making body charged with resolution of the dispute at issue.

III. The Decision Below Adopts A Construction Of The Federal Employers' Liability Act. 45 U.S.C. § 51 et seq. (1982) That Narrows The Act's Protections For Employees In Contravention Of The Act's Public Policy Favoring Tort Suits Against Covered Employers And In The Absence Of Supreme Court Authority.

The Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1982) (hereinafter "F.E.L.A.") creates a statutory scheme for adjudicating the claims against railroads of railroad employees injured by negligence. "[T]he federal policy underlying the FELA . . . [favors] tort suits against covered employers. . . ." *Myron v. Consolidated*

Rail Corp., 752 F. 2d 50, 53 (2d Cir. 1985). In order to deter the railroads from coercing or intimidating employees to prevent them from assisting fellow employees in prosecuting actions under the F.E.L.A., Congress enacted Section 60. (See Statutory Provisions Involved, *supra* p. 6.)

The purpose of section 60 is to prevent the coercion of employees upon whom an employee-claimant depends to prosecute his claim against the railroad and the Fifth Circuit has recognized a private cause of action under this section for the benefit of the disciplined employee. *Hendley v. Central of Georgia Railroad Co.*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981). Relief under Section 60 is available in order to protect an employee's F.E.L.A. rights in addition to the relief of judicial review provided in the Railway Labor Act under 45 U.S.C. § 153 First (q) (which relates to an employee's rights under a collective bargaining agreement). *Id.* at 1152-53.

45 U.S.C. § 56 (1982) provides that an action under Section 60 must be commenced within three years from the day the cause of action accrued. The district court held that "[w]hile . . . [Woodrum] may indeed have had a Section 60 cause of action when he was originally disciplined for communicating with Robinson, this claim is time-barred under Section 56." The district court appears to hold that the three-year statute of limitations began to run as of May 16, 1978, the date of the letter to Woodrum from Superintendent Smith in which Woodrum was notified that he was dismissed from the service of Southern.

The court of appeals did not reach the statute of limitations question because, in its view, "the conduct for which Woodrum was disciplined is not protected by the statute . . . ." 750 F.2d at 883. That conduct, according to the court of appeals, was (1) arranging for a meeting between an injured railroad employee and F.E.L.A. attorney Frank Burge; and, (2) personally taking the employee to a hotel suite to meet with Burge.

Petitioner's contention, however, is *not* that the charges against him represent protected conduct. It is that the conduct in which he admittedly engaged—i.e., voluntarily furnishing the information to an injured employee that F.E.L.A. attorney Burge would be in town and would be glad to talk with him—is protected under § 60.

The conduct on the part of the railroad that Petitioner contends is a "device . . . the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee" is the railroad's procurement and presentation of false testimony to support charges which, if true, would justify Petitioner's discharge under the applicable collective bargaining agreement. The effect of using this device is to deter railroad employees from exchanging information, such as the name of an experienced attorney, that would assist in the prosecution of F.E.L.A. claims and to rid the railroad of an employee who possesses that information.

The railroad's procurement of false testimony to justify Petitioner's discharge served as a warning to those

employees who would exchange information in furtherance of F.E.L.A. claims. Its conduct was, thus, a device to thwart prosecution of F.E.L.A. claims in contravention of the policy underlying the Act. The private right of action recognized in *Hendley* to redress violations of § 60 should encompass this device by the railroad.

Because the railroad's device is a species of fraud, the relevant statute of limitations could not begin to run until Petitioner knew or should have known of the fraud. *International Ladies' Garment Workers Union v. NLRB,* 463 F.2d 907, 922 (D.C. Cir. 1972). Petitioner's first knowledge of the fact that Robinson's false testimony had been suborned (i.e., that a "device" had been employed) by the railroad was shortly before May 20, 1980. The statute of limitations with respect to Petitioner's § 60 F.E.L.A. claim did not, then, begin to run until just prior to May 20, 1980, when Petitioner learned of Southern's "device" of subordination of false testimony. Petitioner's original Complaint, filed on June 5, 1981, was, therefore, well within the three-year period prescribed by 45 U.S.C. § 56 (1982). Accordingly, the district court could and should have entertained Petitioner's private right of action to void the discharge based on false testimony suborned by the railroad.

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CONCLUSION

FOR THE FOREGOING REASONS, the Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Lonnie M. WOODRUM,
Plaintiff-Appellant,

v.

SOUTHERN RAILWAY COMPANY,
Defendant-Appellee.

No. 83-8722.

United States Court of Appeals,
Eleventh Circuit.
Jan. 15, 1985.

Former railroad employee appealed from an order of the United States District Court for the Middle District of Georgia, 571 F.Supp. 352, Wilbur D. Owens, Jr., Chief Judge, which held that it had no subject-matter jurisdiction over his suit to set aside an order by which he was dismissed from employment. The Court of Appeals, Nichols, Senior Circuit Judge, sitting by designation, held that: (1) in an employee disciplinary hearing, proffer by railroad of statement of a witness, subsequently recanted, was not of the class or kind of fraud constituting an instance of "fraud or corruption by a member of the division making the order" so as to entitle discharged employee to judicial review, and (2) arranging for a meeting between a railroad employee and an attorney for purpose of having employee retain attorney as counsel in a suit against the railroad and personally taking employee to hotel suite to meet attorney was not protected conduct under terms of

criminal statute which voids any contract, rule, regulation, or device intended to prevent employees of a common carrier from furnishing voluntarily information to a person in interest as to facts incident to the injury or death of any employee.

Affirmed.

1. Administrative Law and Procedure—928

Recantation of a witness, associated with charges by him against the side that originally proffered his testimony, even if taken as true on summary judgment, does not suffice to establish that a board which acted in reliance on his original testimony did so outside the scope of its jurisdiction.

2. Labor Relations—416.7

In an employee disciplinary hearing, proffer by railroad of statement of a witness, subsequently recanted, was not of the class or kind of fraud constituting an instance of "fraud or corruption by a member of the division making the order" so as to entitle discharged employee to judicial review. Railway Labor Act, § 3, subd. 1(q), 45 U.S.C.A. § 153, subd. 1(q).

3. Federal Civil Procedure—2654

Rule granting district court the power to set aside a judgment for fraud upon a court reserves otherwise existing jurisdiction but does not create it anew. Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

4. Master and Servant—10½

Arranging for a meeting between a railroad employee and an attorney for purpose of having employee retain attorney as counsel in a suit against the railroad and personally taking employee to hotel suite to meet attorney was not protected conduct under terms of criminal statute which voids any contract, rule, regulation, or device intended to prevent employees of a common carrier from furnishing voluntarily information to a person in interest as to facts incident to the injury or death of any employee. Federal Employers' Liability Act, § 10, as amended, 45 U.S.C.A. § 60.

5. Administrative Law and Procedure—935

A court not having jurisdiction of the subject matter does not have jurisdiction to remand the case to an administrative tribunal believed to have such jurisdiction; the only thing that court can do with such a case is to dismiss it.

Appeal from the United States District Court for the Middle District of Georgia.

Before HENDERSON and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

NICHOLS, Senior Circuit Judge:

This appeal presents for our review a summary judgment by the United States District Court, 571 F.Supp. 352, for the Middle District of Georgia holding that the court

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* Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

has no subject matter jurisdiction over a suit by Woodrum, a former railroad employee, to set aside the order of Public Law Board 1261, by which he was dismissed from employment with Southern Railway Company (Railway). Our jurisdiction is under 28 U.S.C. § 1291. The principal, though not the sole, issue was whether proffer by the Railway of statements of a witness, subsequently recanted, were of the class or kind of fraud constituting an instance of "fraud or corruption by a member of the division making the order" within the meaning of 45 U.S.C. § 153 First (q). Upon carefully reviewing that witness' statements before the board and his subsequent recanting statement, and the context of the entire case, we conclude that the Railway's actions were not such an instance, no actual misconduct by such member being alleged. Others of appellant's contentions are also without legal merit. Accordingly, there was no issue of material fact and the suit was properly dismissed. We *affirm*.

Facts

Plaintiff-appellant Woodrum was and had been since 1965 an engineer who operated trains on the Southern Railway. On April 27, 1978, defendant-appellee, by its Superintendent, L.H. Smith, Jr., served on appellant a notice to attend an "investigation" in which he was told appellee would "investigate" on May 1, 1978 a charge of "conduct disloyal and unbecoming an employee", in arranging for a fellow employee, Eddie Lee Robinson, to meet with an attorney, Frank Burge, for the purpose of having Robinson retain Burge to sue the Railway for an injury under the Federal Employer's Liability Act (FELA), and also that he personally took Robinson to

meet with Burge about March 15 to discuss the case. The carrier then apparently was incensed about its employees acting as runners to solicit retainer of attorneys in such cases, and viewed it as a heinous offense. This view is not in dispute and apparently was well understood, so the subsequent proceedings were conducted on the common assumption that if Woodrum had done as alleged, dismissal from employment was the appropriate penalty. However, no provision of any collective bargaining agreement or rule of the Railway is cited, and apparently the carrier relied on its inherent or implicit rights as an employer.

The "investigation" was conducted with Superintendent Smith presiding, May 8, at the Ramada Inn, Macon, Georgia. It appears to have been more than an ex parte investigation but less than a full evidentiary hearing. It was recorded by tape, but witnesses were not sworn. Woodrum had representatives of his union present who, being apparently laymen, defended him as best they could, and were allowed to call and question witnesses. We go into the testimony in more detail than did the court below, or the parties in their briefs. The presiding officer appeared interested in developing all the facts, and excluded little or nothing anyone wished to present.

The attorney, Burge, had been invited to be present, but excused himself. He is a lawyer who specializes in FELA cases and has offices in Birmingham, Alabama, but apparently practices in Georgia also. He submitted a written statement exculpating himself from any misconduct. There were three witnesses who were present and testified, who are major figures in the fraud issue. Others of slight importance are mentioned further on.

W.B. Piper identified himself as a claim agent for the Southern Railway. His duties included investigating personal injuries to employees and, if settlement was warranted, to settle with them on a fair and reasonable basis. He had investigated two recent injuries to E.L. Robinson, a switchman, the second of which occurred on March 9, and having settled the first earlier, he formally settled the second April 5. But before settling, Robinson displayed to him a letter from Burge, dated March 23, setting up an appointment for him to see doctors in Birmingham, Alabama, and for air transportation to that city. Robinson said he did not know Burge. On April 20 Piper received word Burge had, on April 6, filed a suit on Robinson's behalf against the Railway. He told Robinson of this and that Burge apparently had a written retainer, but Robinson said he had signed only a medical form. On being asked who got him involved with Burge, Robinson said it was Woodrum. Woodrum had called him on the telephone and said Burge was going to be in Macon, Georgia, at the Hilton Hotel for the next day, and Robinson should see him. "I've been hurt before on the railroad and I know what kind of hassle that they can give you." Robinson then told Piper he went to the Hilton and was met in the lobby by Woodrum who took him to Burge and prompted Burge in the discussion of Robinson's injuries that followed. Burge gave Robinson his calling card. After this meeting, Woodrum walked down the hotel corridor with Robinson, asked for the calling card, and wrote his own name and telephone number on the back of it so Robinson could let Woodrum know if he needed anything before Burge contacted him again. The card was produced before Smith, and Woodrum's signature authenticated.

On April 24 Robinson sent Burge a letter avowing he had never retained Burge to bring a suit for him. But this disavowal is incredible in light of the actual retainer contract, which was in evidence, and a tape of his conversation with Burge.

Robinson, however, took the stand. In general he adhered to the story he told Mr. Piper, as had been recounted by Piper. He asserted or tried to make it appear he signed the retainer contract being induced by Burge's trick to believe he was signing two similar papers, the one on top being an authorization to doctors to divulge information about him. He said Burge's questions indicated he already knew about Robinson's injuries.

Woodrum testified that on March 8 he was doing some yard switching, *i.e.*, shuttling a train about the yard, in course of which he heard that Robinson had to have a relief. March 14 he heard Robinson was hurt. The next day he called Robinson on the telephone and asked if he had done anything to cause the injury. Robinson said no —that he had lost about 3 days—and he recounted efforts to see Mr. Smith. Woodrum continued—

> I said Mr. Robinson I cannot tell you what to do about it—I'm no attorney—my attorney will be in town and he would be glad to talk to you. He said who is he Mr. Burge. I said that's right. He said where's he gonna be at. I said the Hilton Hotel about 2:30 this afternoon.

He denied meeting Robinson in the lobby or conducting him to Burge's hotel room, saying Robinson walked into the room where Woodrum and others already were. He

called minor witnesses Nobles and Reid to corroborate this. He admitted he had referred other persons, members of his union, to Burge, but denied that Burge gave him any remuneration for doing so. He *told* Robinson to be at the Hilton at 2:30.

On the basis of this investigation, Superintedent Smith found, by letter May 16, 1978, that Woodrum was guilty of both charges made against him, *i.e.*, of arranging the meeting of Robinson with Burge, and of personally conducting Robinson to a hotel suite to have the meeting. On September 15, 1978, General Manager Moore analyzed the record, affirmed the dismissal, and declined the appeal.

On July 30, 1979, Public Law Board No. 1261, passing judgment on the union's appeal on Woodrum's behalf, said there was "sufficient substantive evidence of probative value" that "claimant was acting as agent for a personal injury attorney specializing in cases against railroads under the [FELA] and attempted by subterfuge, to persuade an allegedly injured employee (not a member of Claimant's organization) to retain attorney to sue Carrier." It will be noted these are not exactly the charges made by Smith, but no issue of that is made here. The discrepancy however does throw light on the care exercised by the board in reviewing the record, which of course included the charges as served. The board further recited that participation in such industrial "ambulance chasing" is contrary to the carrier's interests, patently disloyal, and could not be tolerated. They conceded there might be conflicts in the testimony, but they did not, they said, try facts and weigh evidence. Their mandate was

clear: to deny the claim if there was "substantive evidence of probative value to support the charge." There is also no issue whether this is a proper assessment of the board's functions, and we assume it is for purposes of this case.

Approximately June 15, 1979, Robinson too lost his job with the railroad. May 20, 1980, he provided a sworn Question and Answer statement to Burge. In this statement he acknowledges that he signed the retainer contract knowingly and not by trick, and that he went to the room at the Hilton by himself and not conducted by Woodrum.

Some time after that meeting, the statement continues, he had a conversation with a Ralph Fussel who told him there was a possibility of his losing his job. (Though Fussel is not identified in this statement, a Ralph Fussel participated in the proceedings before Superintendent Smith as representing Robinson's union.) Fussel further said to get out of his dilemma he should cooperate with Piper. He saw Piper, who also said his job was in jeopardy. Piper dictated a letter for Robinson to write Burge, the letter denying that Burge was retained. He also made a statement as Piper dictated. Piper told him to say Woodrum "took you [Robinson] down to the hotel," which was not true. In short, he repudiated much he had said that was damaging to either Woodrum or Burge, and imputed all of it to Piper's dictation.

Finally, at the end of the statement, Robinson said—

> I've been in a mental institution from pressure behind this—College Street Hospital in Macon, Georgia —it was between September or October of —'79.

Piper was alive at the date of this statement, but died shortly thereafter. This lawsuit followed. Jurisdiction was asserted on several grounds, some of which are no longer urged here. District Judge Owens was obviously disturbed by the case and granted summary judgment to the defendant Railway only after several rounds of argument and supplemental briefing. This appeal followed.

Discussion

The "Public Law Board," whose decision we are asked to overturn, is so-called because it was established under the terms of Pub.L. No. 89-456, 80 Stat. 208, approved June 20, 1966. This Act amends 45 U.S.C. § 153 by enabling carriers and unions, whose "minor" disputes were previously referable to the National Railroad Adjustment Board, instead to agree upon special boards to be made up of one carrier designee, one union designee, and a neutral third person to be selected by the first two. 45 U.S.C. § 153 Second. Awards by board majorities shall be "final and binding" and "conclusive on the parties." However, in accordance with 45 U.S.C. § 153 First (q), parties aggrieved may secure judicial review in certain circumstances, though the decision under review is "conclusive." They may file a petition for review in any United States District Court in which a petition for enforcement could have been filed. The board is to file the record of its proceedings. The court is empowered to set this board order aside in whole or in part, or to remand for further proceedings. On such review—

> The findings and order of the division [special board in this case] shall be conclusive on the parties, except

> that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

And by express provision, the usual appellate jurisdiction of courts of appeal, and the certiorari jurisdiction of the Supreme Court, are made applicable to such cases.

The Supreme Court considered these provisions in *Union Pacific Railroad v. Sheehan,* 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978), and stressed the importance of applying them according to their terms in order to effectuate the object Congress had in mind, to confine "minor disputes" to the boards set up for the purpose under section 153.

Senate Rep. No. 1201, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad.News 2285, provides more light as to the meaning and purpose of this legislation. It is to eliminate a large backlog of claims pending before the National Railroad Adjustment Board, to expedite disposition of grievances and disputes, and to provide equal access to judicial review by employee and employer. Two divisions of the board above-mentioned are stated to be badly backlogged, the First Division to the astounding figure of 7½ years work.

As regards judicial review, this report says that under existing law the railroad, if it lost before the board, could obtain judicial review simply by refusing to comply, necessitating a petition for enforcement. But if the employee lost, no judicial review was available. The com-

mittee wanted equal access for both sides. Also, it considered the procedure, both originally and under the proposed amendment, to be essentially for arbitration, and the grounds therefore should be no more than those "commonly provided for review of arbitration awards." Senate Rep. No. 1201, *supra,* at 3, *reprinted in* 1966 U.S. Code Cong. & Ad.News at 2287.

Finally, the committee says it considered a proposal for review under the "arbitrary and capricious" standard, but rejected it out of concern that such a provision would be regarded as an invitation to the courts to treat any award with which the court disagreed as arbitrary or capricious. The committee assumed, however—

> that a Federal court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or fact, and the committee intend[ed] that, under this bill, the courts will have that power.

Id.

Woodrum asserts in effect that the committee in the legislative history added a fourth to the three statutory grounds for which a district court could set aside an award. He says that the award was based wholly on false testimony, that of Piper and Robinson, and that an award based wholly on false testimony is actually and indisputably without foundation in fact.

The assumption that the committee used the legislative history to amend the statute by adding a fourth ground is one not borne out by authority binding in this circuit. According to the interesting discussion of the instant statute and legislative history in *Brotherhood of*

Railroad Trainmen v. Central of Georgia Railway, 415 F.2d 403 (5th Cir.1969), *cert. denied,* 396 U.S. 1008, 90 S.Ct. 564, 24 L.Ed.2d 500 (1970), the alleged fourth ground was most likely intended to interpret and explain the second. *See also Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228 (5th Cir.1970). The committee had in mind the rule in labor dispute arbitration that the award, to be valid, must be based on or flow out of the collective bargaining agreement to be construed, and not on any extrinsic facts or issues, because otherwise it is beyond the arbitrator's authority or jurisdiction. Thus, the committee was really proffering its interpretation of the second ground. The board, however, certainly had authority to believe some witnesses and disbelieve others, and by not prescribing a "substantial evidence" standard of review, Congress made clear that such choices were within the board's jurisdiction only, not the courts'.

We have here, despite unusually dramatic circumstances, a typical case of a recanting witness. There always remains, and does here, a choice for the fact-finder whether the new recanting statement is true, or the former recanted one, or both or neither. Thus, contrary to Woodrum's supposition, the recanting statement does not *per se* establish that the recanted statement was false. Moreover, Piper did not recant his testimony before he died, and it must be taken as still standing. Robinson went, as the case wore on and the pressures grew, into more and more extravagant charges against others to explain his own lack of principle. He made wild charges of unethical conduct against Burge, which Burge demolished because he was still around to do so. The 1980 statement makes

equally wild charges against Piper, but Piper not being around any more, no trier of fact will ever know whether Piper's testimony was or was not false. Robinson's latest statement certainly discredits Robinson. It does not, however, discredit those parts of Robinson's testimony which were corroborated by Woodrum himself, *i.e.*, that he telephoned Robinson about the case and in the ensuing conversation, the name of Burge came up. Also it, with the rest of his statements, throws doubt on the wisdom and good faith of the Railway in proffering Robinson as its witness. The record assembled by Smith embodies Burge's refutation of Robinson's charges against him, which ought to have been noticed by the Railway as a timely warning that something was wrong with Robinson as a witness.

However, most recanting witness situations involve, more or less, charges against the side that proffered originally the now recanted testimony. Such charges are necessary to excuse the recanting witness from initially having testified falsely. A witness recantation is far short of the utter want of foundation in fact that strips the award of its finality. Not only is a mere recantation ineffective to do that, because it still remains to be decided whether the original or the recanting testimony is true, but to give it that effect would be destructive of the summary and expeditious handling and finalization of cases that the committee wished to bring about. Any loser before the board would be given a strong incentive to put pressure on a weak witness and get him to recant.

[1, 2] We hold, therefore, that the recantation of a witness, associated with charges by him against the side that originally proffered his testimony, even if taken as

true on summary judgment, as the district court took it, does not suffice to establish that a board which acted in reliance on his original testimony did so outside the scope of its jurisdiction. We further note that the committee quite intentionally enhanced the summary nature of the dispositions to be made of "minor" disputes, and consequently the powers of the boards. If this might at times result in dispositions unfavorable to workers where a more leisurely disposition fight have safeguarded their rights better, this was a trade-off in a statutory package that secured important new rights for them, as the Supreme Court points out in its case cited above. We say this, not to praise the 1966 legislation, but to explain the reasoning by Congress that led to its enactment.

The other leg of appellant's reasoning is that the board member for the carrier being an agent of management, fraud by the carrier might be imputed to him. We note that appellant introduced nothing to show that the member knew or should have known of the misconduct by Piper which is now relied on. Appellant's reasoning would make meaningless the statutory language limiting the right to reopen to cases of "fraud or corruption by a member." This is a somewhat unusual qualification as it is more usual to allow reopening without such a limitation in case of any kind of fraud generally. *See, e.g.,* 19 U.S.C. § 1521 and 41 U.S.C. § 321. The parties cite only one case, *Merchants Despatch Transportation Corp. v. System Federation No. One Railway Employees Dept.,* 447 F.Supp. 799 (N.D.Ill.1978), and this gives full effect to the apparent intended distinction and thus supports our conclusion. It might be argued the result should be different if the member knew or should have known that the case he was

there to support was tainted by fraud, even if he did not personally participate. There is nothing to suggest that this is such a case. If Piper actually did what Robinson says he did, it would be likely he would conceal his misdeeds from his own company as well as outsiders. As we have already noted, the record that went to the board included material establishing that Robinson had actually retained Burge, and his attempt to show the contrary was false. There is nothing to show that anyone called this material to the carrier representative's attention, and he obviously by his findings, if naively, believed that Burge had got Robinson's signature to the retainer contract by trick, absurd as such an act by Burge would have been. None of this amounts to fraud, though we cannot give very high marks to the care of the carrier's personnel in making up this record.

By the same token, Woodrum was satisfied to be represented by law union officials, though he understood the need for skilled counsel in prosecuting his FELA claim. In this case, far more important to him as it was, he evidently did not realize his need. At any rate, the Burge material that rightly used might have torpedoed the whole case against Woodrum, lay in the record and was innocently submitted to the board. The whole case points to ineptitude or carelessness rather than fraud, on both sides.

[3] Woodrum also cited Fed.R.Civ.P. 60(b) as a grant of authority to the district court to reopen this case for fraud, even if it is not fraud by a board member. The portion relied on is the sentence that the rule does not limit the power of the court to entertain an "independent action"—or "set aside a judgment for fraud upon the court." The practical effect of this clause is to lift the

bar of *res judicata* in certain cases. But the new "independent action" must be one of which the court has jurisdiction otherwise than pursuant to Rule 60(b) itself, for by its terms the Rule only preserves otherwise existing jurisdiction, but does not create it anew. *Bankers Mortgage Co. v. United States,* 423 F.2d 73 (5th Cir.), *cert. denied,* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 793 (1970); *Andrade v. United States,* 485 F.2d 660 (Ct.Cl. 1973), *cert. denied,* 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974); *Carney v. United States,* 462 F.2d 1142 (Ct.Cl.1972). Appellant argues that jurisdiction can be found in the court's diversity of citizenship or federal question jurisdiction. Whatever valdity this may have in other contexts, we do not think it suffices to nullify careful circumscriptions written by Congress respecting the specific subject that the court must deal with. Rule 60(b) cannot be used, as Woodrum wishes, to bootstrap the district court into jurisdiction it would not otherwise have. Congress could not have intended to enact the finality it did for board decisions only to have finality sidestepped by any artful pleader. The review jurisdiction is what was enacted and no more.

[4] The next and final point meriting discussion invokes 45 U.S.C. § 60, a criminal statute which voids any contract, rule, regulation, or device intended to prevent employees of a common carrier from furnishing, "voluntarily," information to a person in interest—

> as to the facts incident to the injury or death of any employee.

Any violation is punishable by a fine of not over $1,000, or imprisonment of not over one year. This is part of

a portion of the U.S.Code relating to liability of railroads to employees for bodily injury or death, the FELA. As a criminal statute, section 60 should be construed strictly, and so construed the information thus to be furnished voluntarily consists of facts relating to death or injury. Some of the information or prompting allegedly furnished Burge by Woodrum possibly might come under this provision, but the charges under which Woodrum was discharged do not. These were, to repeat, arranging for a meeting between Robinson and Burge for the purpose of having Robinson retain Burge as counsel in a suit against the carrier, and personally taking Robinson to the hotel suite to meet with Burge. This is not protected conduct under the terms of section 60. Woodrum argues—

> By its procurement and presentation of false testimony in order to support a charge of "industrial ambulance chasing" against Woodrum, Southern made it known that it would attempt to block the access of employees who might bring a FELA action to information necessary to frame their claims.

No reference to the record is offered to show that Southern actually said in any form of words, express or implied, that it would discipline employees who engaged in protected conduct. The way it framed the charges would suggest to the ordinary mind that by negative inference, at least, it said the contrary. Burge himself, in justifying his right to be recommended by railroad employees to fellow employees, did not rely on section 60, but on *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), authority which is not relied on here. It sanctions the maintenance of recommended lists of attorneys by the union as a concerted activity protected by the first

and fourteenth amendments. While Woodrum was a union member and officer, and the union maintained such a list, according to the record, Burge was not on that list, and Robinson was not a member of the same union as Woodrum.

As the conduct for which Woodrum was disciplined is not protected by the statute, it is unnecessary to consider the limitations question discussed by counsel and by the court below.

Conclusion

[5] The motion for summary judgment was properly granted because appellee was entitled to judgment as a matter of law and there was no triable issue of fact. There is no doubt a fact question whether Robinson's original testimony in the investigation or his recanting statement, are the true ones, so far as they differ. But no possible resolution of that question by trial would develop an adequate jurisdictional basis for the court to set aside or remand the Order of the Public Law Board, in view of the very strict definitions by Congress of the grounds on which such actions may be taken. Federal R.Civ.P. 60(b) does not supply jurisdiction otherwise lacking, nor is the result changed by recourse to 45 U.S.C. § 60. A court not having jurisdiction of the subject matter does not have jurisdiction to remand the case to an administrative tribunal believed to have such jurisdiction. The only thing that court can do with such a case is to dismiss it. *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). A statute may add the option to transfer the case to a court having jurisdiction, but this possibility is not relevant here.

We do not of course award accolades to the Railway or to the board for their handling of this case, and could we discover jurisdiction, our disposition would no doubt be different. There is of course no law that forbids the Railway from itself voluntarily reopening the case, and facing squarely up to the questions the case raises as to the adequacy of the special board procedure as actually applied.

AFFIRMED

APPENDIX B

SOUTHERN RAILWAY SYSTEM
Transportation Department
Macon, Georgia 31201

Leon H. Smith, Jr.
Superintendent

206 Terminal Station
Tel. (912) 743-5697

May 16, 1978*
PR

CERTIFIED MAIL - RETURN RECEIPT REQUESTED CERTIFIED RECEIPT NUMBER 808835

Mr. L. M. Woodrum
4420 Fairfax Drive
Macon, Georgia 31206

Dear Sir:

Please refer to investigation conducted at 10:00 a.m., on May 8, 1978 at the Ramada Inn North, Suite 166, 2400 Riverside Drive, Macon, Georgia. In this investigation you were charged with conduct disloyal and unbecoming an employee in that (1) you arranged for a meeting between Eddie Lee Robinson, a Switchman injured while on duty at Macon, Georgia, on March 9, 1978, and Plaintiff Attorney Frank Burge for the purpose of having Mr. Robinson retain such counsel in a suit against the Carrier under the Federal Employer's Liability Act, and (2) that you personally took Robinson to a hotel suite at the Hilton Hotel in Macon to meet with Mr. Burge for that purpose on or about March 15, 1978.

Evidence adduced in this investigation showed that you are guilty of these charges. You are hereby dis-

missed from the service of Southern Railway System. Please arrange to turn in any company property in your possession to Superintendent of Terminals R. M. Reid.

Yours very truly,

/s/ L. H. Smith, Jr., Superintendent

Cy -
Mr. R. M. Reid
Call Office - Brosnan Yard

APPENDIX C

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
Division 786

SUPERINTENDENT COASTAL DIVISION

June 12, 1978

FILE

May 7, 1978

Mr. L.H. Smith Jr.
Superintendent
Southern Railroad
206 Terminal Station
Macon, Ga. 31201

Dear Mr. Smith:

Please accept this as my appeal on behalf of Engineer L. M. Woodrum for reinstatement to his job, pay for all lost time and record cleared of all charges.

I refer to your letter of May 16, 1978 dissmissing [sic] Engineer Woodrum from service of Southern Railroad in which you state that evidence abduced [sic] from investigation held on May 8, 1978 proved him guilty of charges read into that investigation. This committee does not feel that transcript of investigation supports you in this claim.

Transcript shows this, "that the company in the person of Mr. L. H. Smith, brought charges, judged the case, and rendered the verdict in that he preferred the charges, held the investigation, and dissmissed [sic] Engineer Woodrum from service. This was done despite a request by Vice General Chairman A. W. Lynn that if discipline

was to be applied, he wanted a review of the case with the General Manager.

Transcript clearly shows that company is attempting to use this as a means of intimidation to prevent employees from seeking or giving advice to each other or from other qualified persons in to their injuries. This is clearly in violation of Federal Employees Liability Act in which railroad employees are covered under.

It is apparent from Mr. Piper's on "transcript page six" that company was aware Mr. Robinson had consulted Attorney Frank Burge some five days prior to settling for the March 9, 1978 injury. On page ten Mr. Piper states that he settled for the January 23, 1978 injury on January 31, 1978. Just one week to settle for this injury, but the March 9, 1978 injury was not settled until April 5, 1978 and only after company knew Mr. Robinson had consulted Attorney Frank Burge. This supports Mr. Woodrum's statement that Mr. Robinson asked him what to do about collecting his claim.

Transcript clearly shows that Mr. Robinson "at the time of the March 15", 1978 meeting knew exactly who Mr. Burge was. With this fact in mind Mr. Robinson had to know why he was there and it certainly wasn't medical advice. The fact that a mere phone call from a man he stated he did not know, prompted him to go to a meeting with Mr. Burge shows he was both willing and anxious to talk about his claim with an attorney. This is further proved in recorded conversation between Eddie Lee Robinson and Frank O. Burge. Mr. Robinson under questioning of Mr. Smith only took exception to one small part of that being "I'm on twenty five percent" by Frank

Burge. He further stated that the forms signed by him were all filled in. Now the only way he could have known this was if he had read them. This shows that he knew what he had signed or that he is lying or possibly both.

Mr. Tillotson is mentioned as the claim agent Mr. Robinson was dealing with on the March 9, 1978 injury. Mr. Piper stated that he settled with Mr. Robinson for the March 9, 1978 injury. This raises the question of why and at what point did Mr. Tillotson leave and Mr. Piper take over in the settlement of this claim. However this does further prove Mr. Woodrum's account of the phone conversation with Mr. Robinson on March 15, 1978 of Mr. Robinson asking what he should do about collecting his claim.

Transcript shows Mr. Robinson stating that Mr. Woodrum escorted him from the lobby of Hilton Hotel to Mr. Burge's hotel room. However two witnesses, Mr. Nobles, and Mr. Reid and sworn statement of Lawyer Frank Burge place Mr. Woodrum in Mr. Burge's room when Mr. Robinson arrived.

Trascript [sic] shows Mr. Robinson stating that Engineer Woodrum did not talk him into signing a contract with Attorney Frank Burge.

Mr. Robinson was very hazy on remembering dates and what took place on these dates, even to when he settled his last claim, but on other points he was very positive about what took place. Such as his claim that Mr. Woodrum escorted him to Mr. Burge's hotel room even though he could not remember the exact date the meeting took place. Mr. Robinson states he did not hire Frank Burge

as his attorney while at the same time claiming to have read the forms signed by him. He further stated that signature on contract of employment was hie [sic] own. It is obvious from this talk that Mr. Robinson knew a contract had been signed.

Both Mr. Robinson's sworn statement & letter to Mr. Burge are dated April 24, 1978 four days after reciept [sic] of that Eddie Lee Robinson was suing Southern Railroad from Mr. Piper's statement on page seven of transcript. Exhibit G summons filed on behalf of Eddie Lee Robinson was received by company on April 12, 1978. Mr. Robinson's actions in regard to these two documents was obviosly [sic] at the bidding of Mr. Piper. Now if indeed Mr. Robinson had settled with company on April 5, 1978 as claimed, by Mr. Piper, this put Mr. Robinson in a very bad posistion [sic] as the contract signed by him hiring Frank Burge as his attorney was dated 16, March 1978 well prior alledged [sic] settlement of claim. This is obviosly [sic] a carefully arranged plot to get someone out of a tight spot.

Transcript of investigation while generally correct has some irregularities in it. On page forty-one Mr. Smith questioning Mr. Woodrum asked did you refer Mr. Nobles to Mr. Burge, transcript shows Mr. Woodrum's reply as sure did. Mr. Woodrum's reply to this question was sure didn't. On page fifty two transcript shows Mr. Long Requesting [sic] that Mr. Reid be excused while it was Mr. Lynn making this request. Mr. Robinson statement brought into the first part of the investigation was not made available to this committee for referral or questioning of Mr. Robinson.

It is the opinion of this committee that transcript and attached exhibits clear Mr. Woodrum of all charges therefore Engineer Woodrum should be reinstated to service, paid for all lost time, and record cleared.

Yours Very Truly

/s/ W.W. Long
Local Chairman 786

APPENDIX D

SOUTHERN RAILWAY SYSTEM
Transportation Department
Macon, Georgia 31201

Leon H. Smith, Jr.
Superintendent

206 Terminal Station
Tel: (912) 743-5697

June 15, 1978*
PR

Mr. W. W. Long
Local Chairman 786
Brotherhood of Locomotive Engineers
3415 Travis Boulevard
Macon, Georgia 31206

Dear Sir:

This will acknowledge receipt of your letter dated May 7, 1978, which is an appeal for Engineer L. M. Woodrum for reinstatement, pay for all lost time, and record cleared of all charges.

While your letter is dated May 7, 1978, it was received in this office on June 12, 1978. It is noted that in your letter you referred to my letter of May 16, 1978, and the whole subject of your letter is results of an investigation held on May 8, 1978.

The purpose of this letter is to set the record straight that the correct date of your letter should be June 7, 1978, instead of May 7, 1978.

Yours very truly,

Superintendent

BL/CY —
MR. T. C. SHELLER:

*Since your office assisted in preparing of charges, etc., I thought it would be appropriate to see if you care to suggest a response to Mr. Long's letter, copy attached.

L. H. SMITH, JR.

APPENDIX E

SOUTHERN RAILWAY SYSTEM
Transportation Department
Macon, Georgia 31201

Leon H. Smith, Jr.
Superintendent

206 Terminal Station
Tel: (912) 743-5697

July 29, 1978 w

Mr. W. W. Long
Local Chairman 786
Brotherhood of Locomotive Engineers
3415 Travis Boulevard
Macon, Georgia 31206

Dear Sir:

Reference your June 7, 1978, appeal letter on behalf of Engineer L. M. Woodrum in which you requested that he be reinstated to service, paid for all time lost and his record cleared of all charges.

Evidence adduced during the investigation on May 8, 1978, clearly established that Mr. Woodrum called Mr. E. L. Robinson's home and arranged for him to meet with Attorney Frank Burge for the purpose of soliciting his personal injury case on behalf of an attorney whose chief business is representing plaintiffs in personal injury suits against railroads under the Federal Employers Liability Act.

In both his written and oral statements, Mr. Robinson adamantly maintained that Mr. Woodrum arranged this meeting and personally took him from the lobby to Mr. Burge's suite at the Hilton Hotel in Macon. Mr.

Robinson's testimony likewise shows that he had no knowledge that Mr. Burge was an attorney prior to this meeting and at no time did he ever consider sueing [sic] the company as a result of his injury. His testimony further indicates that only through devious means was his signature secured on a contract retaining Mr. Burge. Mr. Robinson never expressed a desire to retain Mr. Burge's services and was led to believe during the meeting that he was merely signing medical authorization forms.

Your allegation that the company is preventing employees from seeking advice following injuries is entirely without foundation. Mr. Robinson was handling his claim with the Claim Agent and vehemently denied seeking the advice of an attorney. On the contrary, Mr. Woodrum sought out a naive and inexperienced yardman and placed him in contact with an attorney who he knew would, and in actuality did try to influence Robinson against making an amicable settlement with the Carrier's Claim Department. His actions in encouraging and arranging for this meeting can not be construed as falling within the realm of his responsibilities as a BLE officer. Mr. Robinson was not a member of his labor organization and Mr. Burge was not a BLE-affiliated counsel. As a result of his actions which were intentionally adverse to the interests of his employer, Mr. Woodrum was guilty of conduct unbecoming an employee and justifiably dismissed.

You also stated in your appeal letter that Vice Chairman Lynn had requested a review of this case with the General Manager if discipline was to be applied. As you know, if your Organization continues to take exception to the dismissal of Mr. Woodrum the next avenue of appeal

is to the General Manager with whom you will be able to discuss your position.

In regard to your allegations of irregularities in the transcript of investigation, I have again listened to the original tapes and find that Mr. Woodrum did respond, "Sure did" when questioned as to whether he also referred Mr. Nobles to Mr. Burge. I would also like to point out that Mr. Robinson testified at length concerning the sworn statement entered during the investigation and underwent extensive questioning by Mr. Lynn, Mr. Woodrum and yourself regarding it. At no time during the investigation did any of you indicate that you wished a copy of the statement to refer to, nor did any of you express any problems in questioning Mr. Robinson without access to such a copy. Further, when asked if the investigation had been conducted fairly, Mr. Woodrum replied that it had and you and Mr. Long took no exception to the fact that a copy of Mr. Robinson's statement was not provided to you during your questioning of him.

Based upon Engineer Woodrum's disloyal activities in soliciting Mr. Robinson's injury claim on behalf of Attorney Burge, I am not agreeable to restoring him to service or paying him for lost time, and your appeal on his behalf is declined.

Yours very truly,

L. H. SMITH, JR.

BL/CY
MR. H. R. MOORE
MR. T. PARKER
MR. T. C. SHELLER

APPENDIX F

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
Division 786

August 16, 1978

Mr. L. H. Smith Jr.
Superintendent
Southern Railway
206 Terminal Station
Macon Ga. 31201

Dear Mr. Smith:

I refer to your decline of my appeal on behalf of Engineer L.M. Woodrum, of July 29, 1978.

This committee can not agree with your dissision [sic] therefore am appealing this claim to General Chairman B of L E for handling.

Yours Truly

/s/ W.W. Long
Local Chairman 786

APPENDIX G

GENERAL COMMITTEE OF ADJUSTMENT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

Southern Railway System Lines

C. H. Dickenson, General Chairman
17 - 20th Court Northwest
Birmingham, Alabama 35215

August 31, 1978
File: A345-786D

(Filed September 5, 1978)

Mr. H. R. Moore, General Manager
Eastern Lines, Southern Railway System
99 Spring Street, S.W.
Atlanta, Georgia 30303

Re: Claim of Coastal Division (Macon Yard) Engineer L. M. Woodrum for restoration to service, seniority unimpaired, pay for all time lost, and clear record of charges; incident to investigation conducted in Suite 166, Ramada Inn North, 2400 Riverside Drive, Macon, Georgia, on Monday, May 8, 1978. Article 31, Schedule Agreement.

Dear Mr. Moore:

Mr. Woodrum was charged in this instance by letter dated April 27, 1978. Said letter states in part:

" . . . (1) you arranged for a meeting between Eddie Lee Robinson, a Switchman injured while on duty at Macon, Georgia, on March 9, 1978, and Plaintiff Attorney Frank Burge for the purpose of having Mr. Robinson retain such counsel in a suit against the Carrier under the Federal Employer's Liability Act,

and (2) that you personally took Robinson to a hotel suite at the Hilton Hotel in Macon to meet with Mr. Burge for that purpose on or about March 15, 1978."

A thorough review of the transcript regarding the charges outlined above reveals the following regarding charge #1. Mr. Woodrum is alleged to have arranged a meeting between Mr. Robinson and Mr. Burge for the purpose of having Mr. Robinson retain Mr. Burge in a suit against the Carrier. Mr. Robinson, in answer to direct questioning in the transcript, states that Mr. Woodrum did not talk to him about having Mr. Burge sue the Carrier. See Mr. Robinson's testimony on Page 20:

Q. In other words, he didn't pick you up at the house and bring you down. You come down of your own accord and you also stated you come down here to talk about medical attention that Mr. Woodrum had not talked you into seein' a lawyer about a law suit. Didn't you state that too?

A. Right.

Also on Page 66:

Q. Mr. Robinson—knowin' that you had done settled already—why did you go down there to see Mr. Burge?

A. Medical advice.

Q. In other words—you didn't know that he was gonna sue the Railroad?

A. No sir I didn't.

Q. In other words—Mr. Woodrum didn't—didn't tell you to ah—git him as your attorney—to sue the Railroad?

A. No sir, he didn't.

Q. He didn't advise you Mr. Burge would be a good attorney for you to sue the Railroad—is that right?

A. No sir.

Q. In other words—in your opinion—you went down there on your own?

A. In a way—I pursued my own medical facts.

Q. And you were not going down there on information that Mr. Woodrum give you—Woodrum gave you—is that right? In other words—he didn't advise you to hire Mr. Burge as a lawyer?

A. No sir.

Also on Page 67:

Mr. Smith to Mr. Lynn:

Q. Ah—just a minute—you keep saying that—but Mr. Robinson—according to testimony had not settled with the Railroad at the time of this meeting . . .

A. Well Mr. Smith—according to the testimony you have Mr. Woodrum charged with the fact that he ah—he got Mr. Robinson signed up with Mr. Burge—and Mr. Robinson just stated that he did not git him to sign up with Mr. Burge—he also stated that he . . .

Q. Well let's go ahead with your question . . .

A. Took him to the Hilton and he stated he didn't take him to the Hilton.

Q. He stated he took him to his room—he's answered that about ten times—and he's stickin' to it . . .

A. Well three more people here say he didn't . . .

Q. Well.

Again on Page 68, Mr. Lynn to Mr. Robinson:

Q. And did ah—git this thing straight now—Mr. Woodrum did not talk you into hiring Mr. Robinson—as your lawyer?

A. That's correct.

Q. He didn't take you down to the Hilton?

A. No he didn't.

Q. That's all.

As you can see, by his own admission, Mr. Robinson clearly states for the record that Mr. Woodrum did not try to have Robinson hire Mr. Burge to file suit against the Carrier as alleged.

With regard to charge #2, that Mr. Woodrum personally took Mr. Robinson to a hotel suite at the Hilton Hotel to meet Mr. Burge for that purpose: Again the record is replete with evidence that Mr. Robinson came to the Hilton Hotel of his own accord, and Mr. Woodrum was already in Mr. Burge's suite when Robinson arrived. Mr. Reid, on Page 53, in answer to Mr. Smith, states Mr. Woodrum did not leave the room; he was there all the time. Mr. Noble, on Page 55, states Mr. Woodrum was present when Mr. Robinson arrived. Also, Mr. Burge, in his sworn notarized statement, confirms Mr. Woodrum was in his suite when Robinson arrived (copy attached as exhibit in transcript).

Even if Mr. Woodrum had been guilty as charged, he has the right to counsel with employees concerning matters of this nature. See U. S. Supreme Court decision attached as Exhibit O to the transcript. The Carrier, in this regard, is attempting to deny an individual the right to free speech as guaranteed by the Supreme Court.

The evidence of record notwithstanding, it is apparent that Mr. Woodrum was not afforded a fair and impartial investigation as provided by the Schedule Agreement in that Mr. Smith preferred charges, conducted the hearing, and passed judgment. It is also noted that Mr. Woodrum was held out-of-service prior to the hearing, indicating prejudgment and prejudice.

This appeal is based on the record in its entirety and made a part of same. Accordingly, I shall not further burden the record with additional references, however, reserve the right to do so to the extent necessary in any further handling which may be required.

Therefore, I respectfully request that claimant be restored to service as requested, in accordance with provisions of the Agreement rule cited.

Yours very truly,

/s/ C. H. Dickenson
General Chairman

CHD/lh
cc: Local Chairman
Claimant

APPENDIX H

SOUTHERN RAILWAY SYSTEM
Transportation Department
Eastern Lines
Atlanta, Georgia 30303

H. R. Moore,
General Manager

99 Spring Street S. W.
Tel. (404) 688-0800

September 15, 1978 K/kg
E-2462-D

Mr. C. H. Dickenson, General Chairman
Brotherhood of Locomotive Engineers
Birmingham, Alabama

Dear Mr. Dickenson:

Reference your letter of August 31, 1978, your File A345-786D, appealing claim in behalf of Coastal Division, Macon Yard Engineer L. M. Woodrum for restoration to service, seniority unimpaired, pay for all time lost, and clear record of charges incident to investigation conducted in Suite 166, Ramada Inn North, 2400 Riverside Drive, Macon, Georgia, on May 8, 1978, alleging Article 31 of the Schedule Agreement.

After further review of the transcript of the investigation I see no reason to alter the decision rendered by Superintendent Smith and by reference thereto make his declination a part of this continuing declination.

It is my opinion that the evidence as contained in the transcript of the investigation is sufficient to uphold the discipline rendered Mr. Woodrum.

To further support my position I bring your attention to Page eight of the transcript in which Mr. Piper's statement reflects the following, Eddie Lee Robinson's "wife woke him up and told him that Mr. Woodrum was on the phone and wanted to talk to him. Eddie at that time picked up the phone and his recounting of the conversation was that Mr. Woodrum said this is L.M. Woodrum, Mr. Burge is going to be at the Hilton Hotel today, I think you ought to see him. I've been hurt before on the railroad and I know what kind of hassle that they can give you. Eddie then told me that he hung up the telephone and told his wife said well, I don't know, maybe I better go on down there and see. Eddie told me then that he did go down to the Hilton Hotel and he was met in the lobby by Mr. Woodrum and Eddie didn't know where he was going except that he was going to the Hilton. Mr. Woodrum had instructed him to come to the Hilton and he would meet him which he did. Eddie said that he walked in the lobby and that Mr. Woodrum walked up to him and said, you're Eddie Robinson, I'm L. M. Woodrum. Mr. Woodrum accompanied him to the elevator and said let's go up and see Mr. Burge. They went up to one of the upper floors and walked in. Mr. Burge was there. Reid was there. And Mr. Nobles was there. And Mr. Woodrum introduced Eddie to Mr. Burge and vice versa. And from what Eddie told me Mr. Burge knew quite a bit about both of these injuries one in January and the one in March."

The statement also reflects that Mr. Burge gave Mr. Robinson his calling card and Mr. Woodrum walked out behind him and walked down the hall with him and asked for Mr. Burge's card and Mr. Woodrum then took the

card and wrote his name and telephone number on the back of it and gave it back to Eddie Robinson and told him that if he needed anything before Mr. Burge contacted him to be sure and let him know. At that point Mr. Woodrum made the comment that he thought it would probably be a good idea not to say anything about this.

On Page 12 of the transcript Mr. Smith questions Mr. Robinson in which Mr. Robinson states, "Around about 10:30 or 11:00 o'clock the telephone rang and my wife told me L. M. Woodrum was on the phone and wanted to talk to me. And I talked to Mr. Woodrum, I didn't know him at the time. And he told, he said ah that ah he understood I had had a accident the night before well the week before rather. Said ah Mr. Burge would be in town and he think I need to come down and see Mr. Burge and ah I was under the impression that Mr. Burge was somebody with the union—a union official or something like that you know it was about seein' another doctor. So I told my wife, I said I guess I better go down there because I might have to end up takin' another physical or something you know where I continue to working right after the accident I had. And she said you might had, you better go on. So Mr. Woodrum told me to be down there at 2:30 p.m. at the Hilton Hotel. When I walked into ah the Hilton lobby, I didn't see anyone that I recognize. So Mr. Woodrum he walks up to me and told me said you Eddie Robinson, he was L. M. Woodrum. Come on up to Mr. Burge himself. And ah went up the elevator we went upstairs and went to his room. I can't recall the room number and ah he knocked on the door and Mr. Burge opened the door. Mr. Woodrum and I went in. There was Mr. J. W. Reid and Frank Nobles in there at

the time, ah Mr. Burge, he went to questioning me about the accident and what had happened and all and he ask me to sit down and explain just what happened. And I remember signing two documents stating that he wanted me to—believe I should see another doctor and those are the only two statements I recall signing was to see another doctor. He told me I would be hearing from him later on. All right, after that was over with we went out in the hall, Mr. Woodrum and I were talking and hé asked me for Mr. Burge's card. And he wrote his number and name on that card and told me if I needed him at anytime before Mr. Burge contacted him for me to contact him. Well about a week or two later, I received a letter from Mr. Burge stating that he wanted me to come over and made reservations for a airplane ticket, hotel reservations, doctors appointments. So at the time when I see Mr. Burge I was in pain, I was still havin' pain in my back and so I was dealin' with Dr. Ridley at the time. I kept goin' to him to treat me and I came out from under Dr. Ridley and everything was OK. When I got this letter from Mr. Burge, I disregard it. I said I won't go to the Doctor or I won't take the airplane ticket or use the hotel reservation. I just wanted to drop everything. I didn't want to go any further. OK about two or three weeks later, that's when I get this call from Mr. Piper telling me did I know Mr. Burge had sued the Railroad for a hundred thousand dollars in my name which I had no knowledge of and I didn't give him no authorization to sue the Railroad or nothing.

Q. Mr. Robinson, this card that Mr. Piper identified, can you identify it also?

A. Yes sir, this is the card, the call card from Frank O. Burge, Jr., P.C. he gave me.

Q. What's on the back of that?

A. Signature of Mr. L. M. Woodrum and telephone number. And the telephone number I had on the bottom that I erased.

Q. Mr. Woodrum wrote that in your presence?

A. Yes sir, he did.

Q. Mr. Robinson, can you identify this?

A. Yes sir, I can.

Q. What is that?

A. It's a sworn statement by me made by the court reporter Jeweldine Johnston.

Q. It this conversation between you and Mr. Piper?

A. Yes sir, it is.

Q. Mr. Robinson did you at anytime tell Mr. Burge either in person or in a letter that he was not representing you and he was not retained by you as a lawyer?

A. Yes sir.

Q. I hand you a photocopy of a letter. Can you identify that?

A. Yes sir I can.

Q. What is that?

A. It's a letter I wrote to Mr. Burge stating that where he had got me to sign those papers, he was author—that I was authorizing him to sue the railroad. That I was tricked into signing those papers, that I did not hire him as a lawyer. I was under the impression that he was wantin' me to see a doctor. That would nothin' be taken —no action would be taken until I see a doctor which I didn't under his ah—made an appointment.

Q. The time you went to see Mr. Burge, did you know who he was and what his business was?

A. At the time I went to see him, I didn't know exactly who he was.

Q. And was he recommended to you by Mr. Woodrum?

A. Yes sir."

On Page 34 of the transcript Mr. Smith questioning Mr. Woodrum in which Mr. Woodrum stated Mr. Burge had called him wanting to see him in reference to his business with him and he then called Mr. Robinson at his home between 11:30 and 12:00 o'clock on March 15 and asked Mr. Robinson did he get hurt on the job the week before. He said he did and Mr. Woodrum asked him if he moved the cut of cars or anything to cause him to get hurt. Robinson stated no that he was throwing the switch. Mr. Woodrum then stated that he could not tell him what to do about it that he was no attorney but his attorney would be in town and would be glad to talk to him.

On Page 59 of the transcript Mr. Windham questioned Mr. Nobles.

"Q. Did you state that you called Mr. Woodrum on other occasions—ah—to develop Mr. Burge's arrival time—the times he's been here?

A. Not on different occasions—what happened like I said Milton and I was talkin' and I told him I wanted ah—to see Mr. Frank when he come to town—when he got to see him—I knew Milton had a case with him and Milton said he should be here pretty soon—he told me—and I said well—give me a buzz when he does come—and that's

when Milton called me—I asked him to call me—and that's when he told me when he'd be in—cause I met him down at the Hilton.

Q. How did you—why and where did you see Mr. Burge the first time?

A. Well I saw him ah . . .

Q. In connection with an incident you refer to—did you discuss this case with him and why—what did you discuss?

A. Oh that was at the Ramada Inn—about oh—I expect two or three months.

Q. How was this meeting arranged?

A. Oh I talked to Milton about that—but I didn't—he didn't call me—I called him.

Q. In other words, the times that you wanted to speak with Mr. Burge you contacted Mr. Woodrum to find out when he would be in town.

A. Well sir when we'd be talkin I'd ask him and he told me that he would be in town and I asked him when . . .

Q. In both the cases?

A. That's correct."

On Page 60 of the transcript Mr. Smith questions Mr. Nobles.

"Q. Is Mr. Woodrum—ah—Mr. Burge's contact in Macon?

A. I wouldn't say so—I have Mr. Burge's phone number—I've talked to Mr. Burge myself by phone.

Q. Why is it necessary to make the arrangements through Mr. Woodrum?

A. Well—he'll be comin' to town and there's no use to makin' two or three trips—and I figured . . .

Q. Did—ah—Mr. Burge know that you wanted to see him?

A. Yes sir.

Q. You made an appointment with him?

A. I had yes sir.

Q. How did you do that?

A. By talkin' with him.

Q. You called him?

A. I called him one time.

Q. I mean on March the 16th—did you call him?

A. No I didn't call him that day—I remember one day I called him—but it wasn't that far back.

Q. How did you make the appointment for March the 16th?

A. Well I knew he was gonna be in town—and I made the appointment—I asked Milton to tell him I wanted to see him . . .

Q. So you talked through Mr. Woodrum?

A. Well he was comin'—I told him to call me and I wanted to talk with him when he come in—that's how I got in touch with him."

Statements throughout the transcript of the investigation clearly and conclusively prove claimant guilty and are sufficient to uphold the discipline rendered Engineer L. M. Woodrum, therefore I cannot agree to allow your appeal by restoring Engineer Woodrum to service with

pay for lost time and all other privileges and benefits as appealed for.

Your appeal remains declined in its entirety.

Yours very truly,

/s/ H. R. Moore
General Manager

Bl/Cy-
L. H. Smith:

Furnish a list of lost time and the usual writeup on a discipline case for Mr. Woodrum.

/s/ H. R. Moore

APPENDIX I

GENERAL COMMITTEE OF ADJUSTMENT
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

Southern Railway System Lines
C. H. Dickenson, General Chairman
17 - 20th Court Northwest
Birmingham, Alabama 35215

September 18, 1978
File: A345-786-D
Gen. Mgr. File ————

(Filed September 21, 1978)

Receipt of your letter is acknowledged.
The matter has been assigned our file No. E5124

Mr. G. E. Anderson
Asst. Director of Labor Relations
Southern Railway System
P. O. Box 1808
Washington, D.C. 20013

Re: Claim of Coastal Division (Macon Yard) Engineer L. M. Woodrum for restoration to service, seniority unimpaired, pay for all time lost, and clear record of charges; incident to investigation conducted in Suite 166, Ramada Inn North, 2400 Riverside Drive, Macon, Georgia, on Monday, May 8, 1978. Article 31, Schedule Agreement.

Dear Mr. Anderson:

I appeal to you [sic] above-captioned case and our position with respect thereto is the same as stated in our appeal letter to General Manager Moore dated August 31, 1978, which is made a part of this continuing appeal.

I respectfully request claimant be restored to service as requested, in accordance with provisions of the Agreement rule cited.

Yours very truly,

/s/ C. H. Dickenson
General Chairman

CHD/lh
cc: Local Chairman
Claimant

H. R. MOORE:
Please let me have all the papers in connection with this claim.

G. E. Anderson

APPENDIX J

SOUTHERN RAILWAY SYSTEM
Personnel Department
Post Office Box 1808
Washington, D.C. 20013

R. E. Loomis
Assistant Vice President
Labor Relations

920 15th Street, N.W.
Tel: (202) 620-4450

October 25, 1978
E-5124

T. Parker, Jr.
T. C. Sheller
R. S. Spenski
Directors of Labor Relations

G. E. Anderson
J. L. Ferrell
W. R. Mallard
J. W. Staley
M. G. Stevens
C. B. Thomas
Assistant Directors
of Labor Relations

Mr. R. E. Branton, General Chairman
Brotherhood of Locomotive Engineers
Birmingham, Alabama

Dear Mr. Branton:

Referring to your organization's letter of September 18, file A345-786D, and our discussion in conference today concerning claim of Engineer L. M. Woodrum, Coastal Division (Macon Yard), for restoration to service with seniority unimpaired, pay for all time lost and clear record of charges incident to dismissal for conduct disloyal and unbecoming an employee, March 9 and 15, 1978.

This will confirm declination of the claim during our conference today, at which time I reaffirmed Carrier's position with respect to the proven charges and specifications, as set forth at length in previous correspondence by Superintendent Smith and General Manager Moore.

At the conclusion of our discussion it was agreed that this claim will be listed for adjudication by Public Law Board 1261.

Very truly yours,

/s/ G. E. Anderson
Assistant Director
of Labor Relations

APPENDIX K

PUBLIC LAW BOARD NO. 1261

Award No. 138
Case No. 189

(Filed August 17, 1979)

PARTIES TO DISPUTE:
Southern Railway Company

and

Brotherhood of Locomotive Engineers

STATEMENT OF CLAIM:

Claim of Coastal Division (Macon Yard) Engineer L. N. [sic] Woodrum for restoration to service, seniority unimpaired, pay for all time lost, and clear record of charges; incident to investigation conducted in Suite 166, Ramada Inn North, 2400 Riverside Drive, Macon, Georgia, on Monday, May 8, 1978. Article 31, Schedule Agreement.

FINDINGS:

After reviewing this rather lengthy record, the Board concludes that there was sufficient substantive evidence of probative value to warrant a finding by the Carrier that Claimant was acting as an agent for a personal injury attorney specializing in cases against railroads under the Federal Employers Liability Act, and attempted, by subterfuge, to persuade an allegedly injured employe (not a member of Claimant's organization) to retain attorney to sue Carrier.

Participation in such industrial "ambulance chasing" is clearly contrary to the interests of Carrier, patently disloyal, and cannot be tolerated.

While it may be argued that there were conflicts in the testimony as to Claimant's involvement, this Board is not a trier of fact and does not weigh evidence. This Board's mandate is clear: if there is substantive evidence of probative value to support the charge, we will deny the claim; if there is no such evidence, the claim must be sustained.

AWARD

Claim denied.

/s/ illegible
Neutral Member

/s/ T. C. Sheller
Carrier Member

/s/ illegable
I Dissent
Organization Member

Date: July 30, 1979

APPENDIX L

LONNIE M. WOODRUM,

Plaintiff,

v.

SOUTHERN RAILWAY CO., A Corporation,

Defendant.

Civ. A. No. 81-121-MAC.

United States District Court,
M.D. Georgia,
Macon Division.
Sept. 12, 1983.

Former railroad employee brought action against railroad challenging his discharge after having been found guilty of "disloyalty" in allegedly procuring an attorney for a fellow employee and Federal Employee's Liability Act plaintiff. On motions to dismiss treated as motions for summary judgment, the District Court, Owens, J., held that: (1) under the Railway Labor Act, district court lacked jurisdiction to review decision of the Public Law Board; (2) employee's cause of action under the Federal Employee's Liability Act was untimely; (3) employee's state fraud claim was preempted by the Railway Labor Act; and (4) employee could not maintain his claim of a "constitutional tort" cause of action.

Judgment for defendant.

1. Labor Relations 416.7

Claim of railroad employee that charges of "disloyalty" resulting in his discharge were based upon a fraudu-

lent affidavit was insufficient, under the Railway Labor Act, for federal jurisdiction. Railway Labor Act, § 3, subd. 1(q), as amended, 45 U.S.C.A. § 153, subd. 1(q).

2. Labor Relations 416.7

Decision of the Public Law Board upholding a railroad employee's discharge for "disloyalty" rested upon a foundation in fact even if witness had lied in testifying against the discharged employee and, thus, federal jurisdiction was precluded.

3. Constitutional Law 275(6)

Fact that discharged railroad employee was precluded, under the Railway Labor Act, from showing that decision of the Public Law Board was procured by fraud did not render statute under which jurisdiction was denied unconstitutional as a denial of due process since he had opportunity before the Superintendent to show that sole witness, who testified against him, was lying. Railway Labor Act, § 3, subd. 1(q), as amended, 45 U.S.C.A. § 153, subd. 1(q); U.S.C.A. Const.Amends. 5, 14.

4. Federal Courts 206

In absence of a distinct basis of subject-matter jurisdiction, district court could not, under "savings clause" of rule governing relief from a judgment or proceeding, consider former railroad employee's independent action to set aside order of the Public Law Board denying appeal of his discharge. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

5. Master and Servant 38

Although former railroad employee may have had a cause of action under provision of the Federal Employee's Liability Act making it a crime for a railroad to discipline an employee for furnishing information to a FELA plaintiff when he was originally disciplined for communicating with such a plaintiff, the claim was time-barred under the Act. Federal Employers' Liability Act, §§ 6, 10, 45 U.S.C.A. §§ 56, 60.

6. States 4.10

Discharged railroad employee's state fraud claim was preempted by the Railway Labor Act. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

7. Action 35

Even if there was sufficient state action to support a constitutional claim arising from the discharge of a railroad employee for providing information to a fellow employee who was a plaintiff under the Federal Employee's Liability Act, a cause of action would not be implied directly from the Constitution since Congress, in enacting the Railway Labor Act and the FELA, created a comprehensive statutory scheme for resolving employment disputes such as those of the discharged employee. Federal Employers' Liability Act, § 10, 45 U.S.C.A. § 60; Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

Ed S. Sell, Jr., Macon, Ga. for plaintiff.

F. Kennedy Hall, Macon, Ga. for defendant.

OWENS, Chief Judge:

The plaintiff in this action is a former employee of the defendant railroad. According to the facts established by the pleadings and stipulated thereto by both parties, the plaintiff was discharged from the defendant's employ on May 16, 1978, after having been found guilty of "disloyalty," a proper ground for discharge under the applicable collective bargaining agreement. The plaintiff appealed this decision to the Public Law Board, No. 1261, pursuant to the Railway Labor Act, 45 U.S.C. § 153. The Law Board, on the basis of the record developed at the hearing before the Superintendent, denied plaintiff's appeal on July 30, 1979.

Plaintiff filed this action on June 5, 1981. Underlying all of plaintiff's various causes of action alleged in his re-cast petition is the following factual contention: that the disloyalty charge was based on the plaintiff's alleged procurement of an attorney for Mr. Eddie Lee Robinson, a fellow employee and FELA plaintiff; that these charges were based upon an allegation that plaintiff "arranged for a meeting" between Robinson and the attorney and that plaintiff "personally took Robinson to a hotel suite at the Hilton Hotel in Mac to meet with Mr. Burge [the attorney] for that purpose on or about March 15, 1978;" that Robinson, the key witness at plaintiff's disciplinary hearing, stated falsely that the above allegations were true; and that on May 20, 1981 [sic], Robinson admitted to the plaintiff for the first time that he (Robinson) lied at the

plaintiff's disciplinary hearing due to threats and coercion directed against Robinson by the defendants.

Based upon this contention, plaintiff has set forth the following claims for relief:

1. A request for judicial review of the decision of the Public Law Board pursuant to 45 U.S.C. § 153 first (q).

2. A request for this court to invoke its inherent equitable power to set aside the ruling of the Public Law Board due to fraud in its procurement.

3. A claim under the Federal Employee's Liability Act (FELA), 45 U.S.C. § 60, upon the ground that the disciplinary hearing against plaintiff was a device employed by the defendant to prevent the voluntary exchange of information to an FELA plaintiff.

4. A claim under Georgia law for fraud.

5. A claim for a constitutional tort insofar as the defendant abridged the plaintiff's right of free speech and assembly.

As to each of these claims plaintiff seeks reinstatement, backpay, attorneys' fees, and punitive damages. The defendants have moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The defendant [sic] arguments will be addressed below. Since a ruling on these motions requires examination of stipulated facts outside of the pleadings, the parties have agreed that these motions and this order shall be treated as a motion for summary judgment under Fed.R.Civ.P. 56. Of course, since the defend-

ant is the movant, for purposes of this ruling it will be assumed that plaintiff's contention regarding Robinson's false statement and its inducement by defendant is true.

Judicial Review of the Public Law Board

Plaintiff first requests this court to review the decision of the Public Law Board pursuant to 45 U.S.C. § 153 first (q). That section provides in pertinent part:

> "If any employee . . . is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award . . . then such employee . . . may file in any United States district court . . . a petition for review of the division's order. * * * The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. . . ."

Plaintiff's claim for review is stated in the alternative:

(a) The plaintiff claims that fraud by the defendant, a party to the administrative proceeding, is a sufficient ground for review under § 153 first (q); or

(b) If fraud by a board member is required, as a literal reading of the statute suggests, then the fraud of

the defendant should be vicariously attributable to the railroad representative on the Public Board;[1] or

(c) if fraud by a Board member is required and the fraud of the defendant is not vicariously attributable to the railroad representative, then the inability of the court to set aside the ruling in the face of fraud by a party renders § 153 first (q) unconstitutional as a denial of due process.

At the outset, the court notes that the scope of judicial review under § 153 first (q) is "among the narrowest known to the law." *Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc.*, 632 F.2d 1321, 1323 (5th Cir.1980); *see, Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 91-94, 99 S.Ct. 399, 401-402, 58 L.Ed.2d 354 (1978). The defendant maintains that the plaintiff has not alleged one of the three specified grounds of review, and that this claim must therefore be dismissed. Plaintiff concedes that the fraud he alleges was not perpetrated by a Board member, but by an employee of a party to the proceedings upon which the Board relied. He states that § 153 first (q) should be interpreted to allow review for fraud of a party, or, in the alternative, that there was fraud by the Board member representing the railroad on a vicarious liability theory arising from the defendant's alleged fraud. Exhaustive research by the parties and this court has revealed only one case in which this argument has been considered. In *Merchants Despatch Transp. Corp. v. Sys-*

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1. The Public Law Boards under the National Railroad Adjustment Board Act are comprised of three members—a representative from the railroad, from the union or employee group, and a "neutral."

tem Fed., etc., 447 F.Supp. 799, 803 (N.D.Ill.1978), the district court held that fraud by a party was an insufficient ground for review, the statute specifically requiring fraud by a member of the Board.

Plaintiff maintains that *Merchants Despatch* should not be followed in that the decision failed to consider the legislative history of § 153 first (q). Subsection first (q) was added to the Railway Labor Act in 1966. A Senate Report accompanying the amendment suggested that the grounds for judicial review under subsection first (q) were to be the same as those under section 9 of the Railway Labor Act. [1966] 2 U.S. Code, Cong. & Ad.News at 2287 (S.Rep. No. 1201). The plaintiff correctly notes that judicial review may be had under § 9 of the Railway Labor Act for fraud by a party. 45 U.S.C. § 159 third (c). He therefore argues that it was the intent of Congress to allow judicial review for fraud by a party under § 153 first (q).

[1] Of course, this argument cuts both ways. If Congress had intended that fraud by a party was sufficient for judicial review, then § 159 third (c) is evidence that it knew how to say so. By failing to employ this language in § 153 first (q), this court must assume that Congress intended what was enacted. The language is plain and unambiguous. When viewed in the light of congressional intent to limit the scope of judicial review of the Public Law Board, this court must find that § 153 first (q) allows judicial review only upon fraud by a Board member, not by a party to the proceedings upon which the Board relies. For this same reason, the court cannot accept plaintiff's vicarious liability theory, *i.e.*, the con-

tention that the fraud of a railroad employee becomes fraud by the Board member who represented the railroad.

[2] Plaintiff next argues that review of the Board's decision may be had under a judicially created basis of review known as the "actually and indisputedly without foundation in reason or fact" standard. *Aerospace Workers, Dist. Lodge No. 19 v. Southern Pac. Transp. Co.*, 626 F.2d 715, 717 (9th Cir.1980); *Otto v. Houston Belt & Terminal Ry. Co.*, 444 F.2d 219 (5th Cir.1970), *cert. denied*, 404 U.S. 984, 92 S.Ct. 449, 30 L.Ed.2d 368 (1971). Plaintiff argues that since Mr. Robinson lied, the Board's decision, to the extent it relied on his statement, was without foundation in fact. However, it must be remembered that if Mr. Robinson's statement to the Superintendent were accepted as true, then there was a basis for the Board's decision under the labor contract. The plaintiff certainly must have known at the time of Mr. Robinson's statement that Robinson was lying (assuming this be the case), as plaintiff's own conduct was the subject of this lie. Plaintiff had the opportunity to refute this statement by either providing evidence of his whereabouts or by attacking Robinson's credibility. Based upon the evidence developed before the Superintendent, the Board's decision was supported by fact. Plaintiff had an opportunity to correct the record at the time it was made. He cannot claim that he is entitled to correct it now when he failed to do so at the proper time. Based upon the record before it, the Board's action does rest upon a foundation in fact.

Plaintiff's final attack upon the strictures of § 153 first (q) alleges that if he is now precluded from showing that

the Board's decision was procured by fraud of a party, then § 153 first (q) is unconstitutional as a denial of due process. In order to complain of a denial of due process, the plaintiff must have been denied a constitutional right. While public employees have a constitutional property interest in their jobs, private employees do not. The rights of private employees are defined by contract. The plaintiff would not seem to be a public employee. The parties have not addressed this issue, and the court is troubled over plaintiff's ability to assert a constitutional claim.

Nevertheless, courts have implied that lack of due process may be a ground for judicial review of the Railroad Adjustment Board. *Union Pacific R.R. Co. v. Price,* 360 U.S. 601, 616, 79 S.Ct. 1351, 1359, 3 L.Ed.2d 1460 (1959). The court therefore considers plaintiff's due process claim.

[3] The plaintiff certainly knew at the time of the hearing before the Superintendent that Robinson was lying. He had an opportunity to present evidence to refute Robinson's accusations. Plaintiff states that he was in the hotel suite with a group of persons when Robinson arrived. It would certainly seem that some of these individuals could have been called to refute Robinson's claims if it is true that plaintiff never left their presence long enough to physically procure Robinson by leaving the hotel, meeting Robinson, and driving him back to the hotel. Since plaintiff had this opportunity when the record was being made, he cannot claim that due process has been denied by this court's current refusal to allow him to prove Robinson's lie. Additionally, as will be developed below, plaintiff could have attacked the entire "disloyalty" charge under § 60 of the FELA. Instead, he al-

lowed the statute of limitations to lapse. It is not a denial of due process to refuse to review the Board's decision when plaintiff himself failed to assert his right to challenge the proceeding at the proper time. For these reasons, the court cannot find a denial of due process in plaintiff's inability to challenge the Board's decision at this late date.

Defendant's motion for summary judgment on plaintiff's prayer for review of the decision of the Public Law Board is GRANTED.

Equitable Jurisdiction to Set Aside the Decision of the Public Law Board Due to Fraud in its Procurement

The plaintiff requests this court to invoke its equitable power to set aside the decision of the Board due to fraud in its procurement. This in turn sparked a venture into the morass of whether the fraud was intrinsic or extrinsic, or whether it has been committed "upon the court." The parties debate the relevance of these issues, as well as the existence of a statute of limitations, under Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b) contemplates two methods by which a party may obtain relief from a judgment or proceeding. 11 Wright & Miller, *Federal Practice and Procedure,* Civil § 2851 (1973). The ordinary method is by *motion* in the *same* court which entered the judgment. Under this procedure, Rule 60(b) lists 14 grounds upon which the motion may be based. One of these grounds is fraud (it matters not whether it is extrinsic or intrinsic) and the time limit for bringing the action is one year from judgment. As stated, this is the normal method, but it is *not*

and cannot be the procedure which plaintiff advances here, for this court did not render the order of which plaintiff complains.

Instead, plaintiff relies on the second method by which relief from a proceeding may be had, *i.e.,* an independent action in a forum other than the one in which the result of which he complains was obtained. As to independent actions, Rule 60(b) sets forth no procedures or time limits. It merely recognizes whatever power a federal court may have to entertain such an action. Thus, defendant's argument concerning a one-year time limit is misplaced. Wright & Miller, *supra,* § 2868 at 241. While the abandonment of the intrinsic-extrinsic distinction is mentioned only in the section with respect to motions to set aside in the rendering court, persuasive authority counsels against reviving this distinction in the independent action procedure. *Id.* Therefore, the court will not address defendant's arguments on this point.

[4] Nevertheless, it must be remembered that this "savings clause" of Rule 60(b) does not confer subject matter jurisdiction on this court to entertain independent actions to set aside judgments or proceedings. *Simons v. United States,* 452 F.2d 1110, 1116 (2d Cir.1971). Since this court did not preside over the proceeding of which plaintiff complains, this court can entertain his motion to set the proceeding aside only if Congress has provided this court with subject matter jurisdiction to act. *Wright & Miller, supra,* § 2868 at 243. Were it otherwise, then any aggrieved spouse in a state divorce action, for example, could file an action in this federal district court to set a property award aside on the ground of fraud by

the other spouse. This court does not possess such a roving commission. Further, since the relief which plaintiff seeks is equitable in nature, the traditional restraints upon equitable intervention must apply.

With these principles in mind, the court notes that the only jurisdiction which can exist is that provided in § 153 first (q). Just as Congress is free to require that certain claims be litigated in state courts, so is it free to require that plaintiff's contractual claims be litigated before the Public Law Board, subject to the limited judicial review provided in that statute. As discussed above, this court does not have jurisdiction over the subject matter with respect to a claim of fraud by a party. Thus, in the absence of a distinct basis of subject matter jurisdiction, this court cannot consider plaintiff's independent action to set aside the order of the Public Law Board. Even if a basis for jurisdiction could be established, the court finds that equity will not allow itself to intervene into a statutory scheme which contemplates limited judicial review. For these reasons, defendant's motion for summary judgment on this claim is GRANTED.

Plaintiff's Cause of Action Under 45 U.S.C. § 60

Plaintiff next alleges a separate cause of action under the FELA, 45 U.S.C. § 60. Section 60 in essence makes it a crime for a railroad to discipline an employee for furnishing information to an FELA plaintiff. *Hendley v. Central of Georgia R.R.Co.*, 609 F.2d 1146, 1150-51 (5th Cir.1980). *Hendley* recognized a private cause of action under § 60 for the benefit of a disciplined employee. The court further noted that, contrary to defendant's conten-

tions in the instant case, the relief provided in § 60 is separate and independent of the relief of judicial review provided in the Railway Labor Act, 45 U.S.C. § 153 first (q), since the former protects a statutory right while the latter relates only to a plaintiff's rights under a collective bargaining agreement. *Id.* at 1151-52.

[5] An action under § 60 must be commenced within three years from the date the cause of action accrued. 45 U.S.C. § 56. The defendant asserts that even if plaintiff has alleged a cause of action under § 60, the action accrued no later than May 16, 1978, the date plaintiff was disciplined for his communications with Robinson, and thus suit was filed after the three-year limitation had expired. Plaintiff responds that a *second* and separate § 60 violation occurred due to the defendant's alleged subornation in May of 1980. The court disagrees with plaintiff. While the plaintiff may indeed have had a § 60 cause of action when he was originally disciplined for communicating with Robinson, this claim is time-barred under § 56. The claim which plaintiff could have asserted when he was originally disciplined was unrelated to whether Robinson gave a truthful statement or not. Plaintiff was disciplined for being disloyal in that he gave certain advice or aid to an FELA plaintiff. He should have known at that time that a possible § 60 action was appropriate to enjoin the disloyalty disciplinary charges. The fact that Robinson may have given a false statement at defendant's request only exacerbated the degree of his employer's retaliation. There was no separate violation, only a continuation of the original claim based upon the legitimacy of a disloyalty disciplinary action. Therefore, plaintiff's § 60 action, even if valid, is barred as being filed beyond

the three year statute of limitations. Defendant's motion for summary judgment with respect to the § 60 cause of action is GRANTED.

Fraud Under Georgia Law

[6] The plaintiff has also alleged an action for fraud under Georgia law. The defendant counters that state law is totally pre-empted by the Railway Labor Act. In order to promote stability in labor-management relations in the important national industry of the railroads, Congress chose to confine disputes under collective bargaining contracts to the Adjustment Board, with limited federal court involvement and no state court intervention. In recognition of this purpose, it has been clearly established that federal law pre-empts all state or common law actions arising from "minor" disputes such as that involved in the instant action. For this reason, plaintiff's state fraud claim is pre-empted by the Railway Labor Act. *Andrews v. L & N. R.R. Co.,* 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); *Magnuson v. Burlington Northern,* 576 F.2d 1367 (9th Cir.), *cert. denied,* 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978). Defendant's motion for summary judgment with respect to the state fraud claim is GRANTED.

Plaintiff's Constitutional Claim

Plaintiff seeks to fashion a "constitutional tort" cause of action on the ground that to discipline an employee for providing information to a fellow employee and FELA plaintiff abridges the first amendment right of free speech and assembly. The parties have not addressed

the issue of whether there is sufficient state action to support a constitutional claim, and the court is highly suspicious that this necessary element is lacking. Nevertheless, there is yet a further reason why this claim cannot be maintained.

Any discussion of whether a cause of action may be implied directly from the Constitution must begin with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971). Of course, the Constitution was drafted so as to define the distribution of power among the three branches of the federal government and between the federal and state governments. While its amendments define the relationship between the government and individuals, it is not ordinarily thought of as creating individual damage actions against government officials. Yet in limited instances, private rights of action have been implied directly from its provisions. *Bivens* and its progeny have created considerable debate concerning the propriety of the judiciary, as opposed to Congress, creating "constitutional tort" actions. In light of this delicate balance of power, the Supreme Court has held that a cause of action should not be implied directly from the Constitution where Congress has provided an alternative remedy explicitly declared to be a substitute for recovery under the Constitution. *Carlson v. Green,* 446 U.S. 14, 18-19, 100 S.Ct. 1468, 1471-1472, 64 L.Ed.2d 15 (1980). In its last term, a unanimous Court held that where claims arise from an employment relationship that is governed by comprehensive substantive and procedural provisions of federal law providing meaningful remedies against the employer, it would be inappropriate for a federal court to

supplement that statutory scheme with a new, nonstatutory damages remedy implied from the Constitution, *Bush v. Lucas*, — U.S. —, —, —, 103 S.Ct. 2404, 2416-18, 76 L.Ed.2d 648, 664-65 (1983).

[7] It is clear that Congress, in enacting the Railway Labor Act and the FELA, intended to create a comprehensive statutory scheme for resolving employment disputes such as plaintiff's. Plaintiff could have framed his constitutional claim under § 60 of the FELA, but has allowed the statute of limitations to expire.

It is clear that Congress is concerned about judicial intervention into labor-management relations in the railroad industry. The mandatory arbitration and limited judicial review provisions of the Railway Labor Act are evidence of this concern. The court believes that Congress would not desire the circumvention of this statutory scheme through the use of constitutional tort claims. Plaintiff's remedies were adequate without resort to this extraordinary form of relief. Therefore, under the reasoning of *Carlson v. Green* and *Bush v. Lucas, supra,* the defendant's motion for summary judgment with respect to the constitutional claim is GRANTED.

Having granted summary judgment in favor of defendant on all of plaintiff's claims as set forth in his re-cast complaint, it is the order of this court that judgment be entered against plaintiff upon all of the claims contained in his re-cast complaint.

APPENDIX M

This judgment, issued as mandate, is made the judgment and order of the District Court.

This 6th day of March, 1985.

Wilbur E. Owens, Jr.
UNITED STATES JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8722

D.C. Docket No. 81-121

LONNIE M. WOODRUM,

Plaintiff-Appellant,

versus

SOUTHERN RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

Before HENDERSON and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

JUDGMENT

(Filed March 6, 1985)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

A True Copy—Attested: Clerk, U.S. Court of Appeals, Eleventh Circuit.

By: /s/ Irene Hendrix
Deputy Clerk
Atlanta, Georgia

Entered: January 15, 1985

For the Court: /s/ Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: March 05, 1985

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8722

LONNIE M. WOODRUM,

Plaintiff-Appellant,

versus

SOUTHERN RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion January 15, 11 Cir., 1985, ——F.2nd——).
(February 22, 1985)

Before HENDERSON and HATCHETT, Circuit Judges, and *NICHOLS, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert J. Henderson
United States Circuit Judge

*U.S. Circuit Judge for the Federal Circuit, sitting by designation.

REHG.-6
(Rev. 6/82)

APPENDIX O

(p. 1)

SWORN STATEMENT
OF
MR. EDDIE LEE ROBINSON

CAPTION

The following statement was taken before me, Yvonne M. Pope, Commissioner and Notary Public on the 20th day of May, 1980 at the Law Offices of Frank O. Burge, Jr., P.A., 1620 First Alabama Bank Building, Birmingham, Alabama, at or about 8:15 A.M.

APPEARANCES:

MR. FRANK O. BURGE, JR., Attorney at Law, 1620 First Alabama Bank Building, Birmingham, Alabama, 35203

Also Present: Mr. L. M. Woodrum.

(p. 2)

MR. EDDIE LEE ROBINSON
being first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. BURGE:

Q. Give us your name, please, sir.

A. Eddie Lee Robinson, Sr.

Q. Mr. Robinson, you like in or near Macon, Georgia?

A. Yes, sir. I live in Macon, Georgia.

Q. Did you, at one time, work for the Southern Railway Company?

A. Yes, sir, I did.

Q. In what capacity, Mr. Robinson?

A. Well, I was a switchman and trainman till I was transferred to the Atlanta side. Working off Atlanta as a trainman on the Atlanta side.

Q. And when did you go to work for the Southern?

A. I went to work for the Southern, I believe, it was in '77 of August. I went on the extra board.

Q. In the transportation department?

A. Yes, sir.

Q. Working in the yard at Macon?

(p. 3) A. Yes, sir. I was cubbing at that particular time.

Q. And in that connection, did you have an on-the-job accident on about January 23rd, 1978?

A. Yes, sir, I did.

Q. Working the hump job?

A. Yes, sir.

Q. The conductor was Henderson; is that right?

A. Yes, sir. Conductor Henderson.

Q. The other switchman was Hamilton?

A. Hamilton.

Q. Who was your engineer?

A. MacMillan.

Q. And did you have another injury on about March the 9th, 1978?

A. Yes, sir.

Q. Working what job?

A. At that particular time I was working the pullback.

Q. 11:00 o'clock pullback?

A. Yes, sir.

Q. And did that involve throwing a switch when you were coming out of the forwarding yard?

(p. 4) A. Yes, sir, I was trying to yank the switch.

Q. And you saw Dr. Ridley and I think you saw Dr. Brown about those injuries; is that right?

A. That's right. That's correct.

Q. Now, sometime in March of 1978 did you meet me at the Hilton Hotel in Macon, Georgia?

A. Yes, sir, I did.

Q. And, at that time, did I have a tape recorder with me?

A. Yes, sir.

Q. Now, there are some skips on this recorder—there are not any skips, but there are some words that the secretary could not understand.

After the second accident, the 11:00 o'clock pullback accident, one of the trainmasters took you to the Emergency Room; is that right?

A. That's correct.

Q. Who was that trainmaster?

A. Mr. Jenkins.

Q. Jenkins?

A. Yes, sir.

Q. Well, I'm going to write Jenkins in on this write up of that tape.

(p. 5) And at that time did a doctor come and talk to trainmaster Jenkins, tell him you had a run-out disc?

A. Yes, sir, he did.

Q. Did trainmaster Jenkins write something down about it?

A. Not as I can recall, sir.

Q. You don't remember whether he wrote anything down or not?

A. No.

Q. I think you mentioned at the time I talked to you he said, "like a ruptured disc syndrome". That was probably my words or your words. Said, "trainmaster Jenkins wrote that down."

A. Yes, sir. I understand him telling me something.

Q. You went home and some trainmaster called you at home?

A. Yeah.

Q. The next morning. Was that the same trainmaster?

A. No, sir. That was Mr. Hawkshaw.

Q. Hawkshaw.

(p. 6) Harshaw, H-a-r-s-h-a-w. Okay. I've got Hawkshaw, but I think it's Harshaw, told you they wanted you to see a company doctor?

A. Yes, sir.

Q. Now, the night that you were hurt up at the hump, again, some trainmaster got you an ambulance.

A. Yeah.

Q. Who was that?

A. That was trainmaster Jenkins the same time.

Q. Okay. Now, do you recall that while I was taping my conversation with you that I filled out a contract of employment where you hired me to handle your cases against the Southern? Do you remember that?

A. Yes, sir.

Q. And while I was filling it out I was asking you some questions; for instance, I asked you the dates again, January the 23rd and the 9th of March; and I asked you what crossover it was on the 23rd. And I filled out some papers as we went along. Do you remember that?

(p. 7) A. Yes, sir.

Q. And this contract that I show you now (indicating) is that one of the papers that I filled out as I was talking to you and one of the papers that you signed, sir?

A. Yes, sir, it is.

MR. BURGE: All right. Mark this as an exhibit to the affidavit.

(Whereupon said document was marked for identification as Exhibit 1.)

Q. And did I also have you sign a medical authorization form so I could write letters to the doctors?

A. Yes, sir.

Q. I sent the one you signed to the doctors; but, is that (indicating) a blank form similar to the one you signed?

A. It's exactly the same form.

MR. BURGE: All right, sir.

Mark this as the next exhibit, please, Ma'am.

(Whereupon said document was marked for identification as Exhibit 2.)

(p. 8) Q. And is this write up of testimony there (indicating) a verbatim record of what I recorded when I talked with you at the Hilton Hotel in Macon in March of 1978?

A. Could I have a few minutes to read it?

Q. Yes, sir. Yes, sir.

(Brief pause.)

THE WITNESS: Yes, sir, this is it.

MR. BURGE: Mark this as the next exhibit, please, Ma'am.

(Whereupon said document was marked for identification as Exhibit 3.)

Q. That was about March 16th, 1978 when you met with me at the Hilton Hotel in Macon; is that right?

A. Yes, sir.

Q. Now, when you came to the hotel how did you get to the hotel?

A. I came by myself.

Q. Now, was that on a Saturday?

A. No, sir, it wasn't on a Saturday. I think, if I can recall, it was on Thursday.

Q. All right. And when you got to the hotel (p. 9) did you check to see what room I was in?

A. No, sir, I didn't.

Q. Did you pick up the phone and ask to speak to me and call me in the room?

A. No, sir.

Q. What did you do?

A. Well, what I did, I knew a guy work at the Hilton.

Q. I see.

A. And I asked him.

Q. And he told you what room I was in?

A. He told me what room you were.

Q. And then did you call the room and tell me that you were there?

A. No, I didn't tell you—

Q. Did you come on up to the room?

A. No, sir. I came on up to the room on my own.

Q. When you got there was Mr. Lonnie Woodrum there?

A. Yes, sir.

Q. Was he the engineer of the train that was involved in the accident that occurred where you were (p. 10) hurt on March the 9th on working on the 11:00 o'clock pullback?

A. Yes, sir, he were.

Q. Now, were any other clients of mine there in the hotel, at that time?

A. Well, I couldn't say that they were clients of yours because I—as far as I—

Q. Well, was Frank Nobles there and J. W. Reed? You didn't know whether they were clients of mine or not.

A. I didn't know if they were clients of yours. That's what I can't say.

Q. Did you know Frank Nobles and J. W. Reed?

A. I knew of them.

Q. Were they the gentlemen that were there in my room with Mr. Woodrum at that time?

A. Yes, sir.

Q. And were they there when you got there?

A. Yes, sir.

Q. And were they there when you left?

A. Yes, sir.

Q. And while you were there did you tell me about your two injuries and hire me to handle your (p. 11) cases?

A. Yes, sir, I did.

Q. And then sometime after that did you meet with a man named Fussel?

A. Ralph Fussel.

Q. Did he have some conversation with you about hiring me?

A. No, sir. In a way he did and a way he didn't.

Q. Tell me, where were you when you talked to him?

A. I was on the receiving yard.

Q. On the job?

A. Yes, sir, on the job.

Q. And what did he say to you?

A. He asked me about the situation what I had got in concerning a claim being paid off about my injuries. And he asked me, said, "well, you know, you stand a possibility of losing your job."

Q. He told you you were going to lose your job?

A. Yes, sir.

Q. Stood a possibility of losing it?

(p. 12) A. Stood a possibility of losing your job.

Q. If you let me handle your claim?

A. Right.

Q. And did he tell you to do anything about it?

A. He said what—I can't say it in front of this lady, what was said.

Q. Well, say it. She's just writing it down. You're not going to hurt her feelings; but, we do appreciate—

A. "Momma Woodrum"—well, "Momma Woodrum"—that's the nickname he used for Mr. Lonnie Woodrum.

Q. Yes.

A. He said, "Momma Woodrum got you into this junk; but, I'm going to get you out of it."

Q. Junk? S-h-i-t?

A. Yeah.

Q. Got you into this s-h-i-t and what?

A. "And I'm going to get you out of it." Said, "but you've got to go along with what I'm going to tell you to do."

Q. All right. And then what did he tell you to do? (p. 13) A. That was to go see Mr. Piper, the claim agent.

Q. Did he tell you to cooperate with Mr. Piper and do what Mr.—

A. He told me to cooperate with Mr. Piper 100%.

Q. Do what Mr. Piper told you to do?

A. Right.

Q. Did you go see Mr. Piper?

A. I went and saw Mr. Piper.

Q. Did you do what he told you to do?

A. I did what he told me to do.

Q. Why?

A. Because my job was in jeopardy and it's the best job I ever had in my life.

Q. What did Piper tell you about losing your job?

A. My job was in jeopardy.

Q. He told you your job was in jeopardy?

A. My job was in jeopardy.

Q. If you didn't do what he told you to do?

A. If I didn't do what he said.

Q. And did he dictate a letter or write out a (p. 14) letter for you to write?

A. No, sir. Mr. Piper, he arranged for me to go see a court—I think it's a Court Reporter.

Q. Court Reporter?

Well, let me ask you about this (indicating) first. Here's a letter dated April 24th that's signed by you; who wrote that?

A. I wrote this letter in Mr. Piper's office.

Q. And did he tell you what to write?

A. He told me what to write.

MR. BURGE: All right. Mark this letter as the next exhibit, please, Ma'am.

(Whereupon said document was marked for identification as Exhibit 4.)

Q. And then did you go somewhere and make a statement to a Court Reporter or somebody like that?

A. I went to this Court Reporter with Mr. Piper.

Q. And was that someplace in Macon, Georgia?

A. Yes, sir, it was.

Q. In the Georgia Power Building?

A. Yes, sir.

Q. Who went with you?

(p. 15) A. Nobody but Mr. Piper.

Q. Mr. Piper went with you?

A. Yes, sir.

Q. And did you have some conversation with Mr. Piper about what you were suppose to say when you got there?

A. Well, we had discussed that before we got there.

Q. And what did he tell you to tell them?

A. He had told me that whatever he asked me, you know, to go along with him, whatever he was saying. And he asked me the questions in front of the Reporter and she wrote it down.

Q. Who asked you the questions?

A. Mr. Piper.

Q. Mr. Piper asked you the questions?

A. Yes, sir.

Q. And did he tell you to say that Woodrum took you down to the hotel when you saw me?

A. Yes, sir.

Q. Was that true or not? Did Woodrum take you to the hotel when you saw me?

A. No, sir, he didn't.

(p. 16) Q. Did he tell you to state that you had not hired me or signed a contract of employment?

A. Did he tell me this?

Q. Yes.

A. Yes, sir, he did. That was stated on that letter what was written.

Q. And was that correct or wrong?

A. Correct that he told me. Yes, sir, he told me.

Q. But, was it correct that you had not signed a paper with me or a contract?

A. That was not correct.

Q. And he knew that. You had told him that; had you not?

A. Yes, sir.

Q. But, he wanted you to tell it differently and wrongly?

A. That's correct.

Q. And when you got to the Georgia Power Building had you gone over what you were to say?

A. Mr. Piper had gone over there with—I went to his office prior to going to Georgia Power.

(p. 17) Q. And he told you what to say?

A. Yes, sir.

Q. And he told you that he would ask the questions and for you to go along with what he asked you, in so far as saying that Woodrum got you to come down to the hotel, and brought you down there, and that you did not sign with me, although I tried to get you to sign with me; is that right?

A. Yes, sir.

Q. Now, are you willing now to—I want you to look at this (indicating). Is this a copy of the statement you made when you got down to the Georgia Power Building that day?

(Brief pause.)

THE WITNESS: Let's go off the record.

Q. No. You can leave it. Let's put everything on the record.

Just review this and tell me—

A. Well, like, I was under stress. I—my job was in jeopardy when I went along with all this.

Q. But, I mean, this (indicating) is—

A. I mean, I don't have to go through all—you know, to read.

(p. 18) Q. This is the statement that you made?

A. Yeah. Uh-huh.

Q. All right, sir.

A. Them—from the question where he asked me and I gave him answers.

Q. All right. It's set up as in Macon, Georgia, 11:15 A.M. on April 24th.

A. Yes, sir.

Q. That's when you went down and made the statement; is that right?

A. Yes, sir.

Q. And that's the same day that he had had you write this letter in his office?

A. Same. Wrote it right in his office.

MR. BURGE: And the letter that we're referring to is Exhibit 4, for the record.

And mark this (indicating) as the next exhibit, please.

(Whereupon said document was marked for identification as Exhibit 5.)

THE WITNESS: Now, Exhibit 4 and 5 are corresponding together; right?

Q. Both the same day; is that right?

(p. 19) A. Right, sir.

Q. And after that, on about May 8th, did you attend an investigation at the Ramada Inn North on Riverside Drive in Macon?

A. Yes, sir, I did.

Q. And, at that time, were you asked questions by various people there?

A. Yes, sir.

Q. And who had you talked with or had you talked with Mr. — well, who had you talked with before you went over to that investigation?

A. Well, prior to the investigation I had talked with Mr. Fussel, Ralph Fussel.

Q. And where had you met with him?

A. Well, I had conversed with him by telephone and seen him personally on the job.

Q. What did he tell you to say?

A. Well, he told me it was my best job, to go along with the company, because the company had been trying to get rid of Mr. Woodrum for a long time. If I wanted my job, my best thing to do was go along with the company.

Q. And not tell the truth?

(p. 20) A. Right. That's correct.

Q. And did you go to the investigation?

A. Yes, sir, I did.

Q. And at the investigation did you do what Mr. Fussell and Mr. Piper had wanted you to do?

A. Well, really, what happened at the investigation, I didn't do, really, what Mr. Fussell wanted me to do, because Mr. Fussell didn't have any words in the investigation; but, Mr. Smith, who was my superintendent at the time, Mr. L. H. Smith.

Q. Well, did you do what Mr. Smith wanted you to do?

A. Well, I did what he wanted me to do, right, because Mr. Fussel had told me, really, what Mr. Smith wanted.

Q. What did Mr. Fussel tell you Mr. Smith wanted?

A. To get rid of Mr. Woodrum.

Q. He wanted you to lie about what had happened at the hotel;—

A. What had happened.

Q. —is that right?

A. That my job was in jeopardy.

Q. But, he wanted you to lie about it?

(p. 21) A. Yes, sir.

Q. And, as a matter of fact, you did not tell the truth about it—

A. I didn't.

Q. —at the investigation?

A. I didn't.

Q. Did not?

A. I did not tell the truth at the investigation.

Q. And in so far as what you didn't tell the truth about the investigation, you didn't tell the truth about the fact that Mr. Woodrum actually did not take you down to the hotel; did he?

A. No, sir, he didn't.

Q. He was a witness in your case; was he not?

A. Yes, sir.

Q. He was the engineer on the train when you had an accident in the yard there?

A. Yes, sir.

Q. And you didn't tell the truth when you told them you had not hired me; you actually had hired me?

A. Yes, sir.

(p. 22) Q. And gotten a letter from me with a copy of the suit papers; hadn't you?

A. Yes, sir.

Q. That had been filed on your behalf?

A. Yes, sir.

Q. About the accidents that you gave me the information on that are covered in Exhibit 3 here to your deposition?

A. Yes, sir.

Q. Well, after you wrote the letter to me that's Exhibit 4, that was the same day that you went down to the Georgia Power Building and gave the statement that Mr. Piper asked you the questions before a Court Reporter?

A. I had wrote the letter prior to going to Georgia Power in Mr. Piper's Office.

Q. He told you what to write?

A. He told me what to write.

Q. And then you made a settlement at some stage of the injuries that you received on January 23rd, '78 and on March 9th, '78; is that right?

A. Yes, sir.

Q. With Mr. Piper?

(p. 23) A. Yes, sir.

Q. Had you made any settlement with him on any of those before you talked with me? Had he paid you some money on the January 23rd, '78 accident before?

A. I can't recall right at the present time, Mr. Burge?

Q. How much did he pay you for both of them put together?

A. As I can recall, this came to around about $350.

Q. For both of them?

A. Yes, sir.

Q. And then how long did you work for them after that?

A. Approximately up until June—June 15, I think it was, '79.

Q. And have you worked with them since?

A. No, sir, I haven't.

Q. Did you attempt to get a leave of absence?

A. Yes, sir.

Q. Did you get a leave of absence from somebody?

(p. 24) A. Yes, sir. I went to Superintendent Reed.

He was Superintendent of the Terminals at the particular time. I went to him and obtained my leave of absence from him through by verbal.

Q. That is orally, verbally?

A. Yes, sir. And he gave me this leave of absence and told me he would get me transferred back from Atlanta back into the yard.

Q. In Macon?

A. Yes, sir.

Q. And did he?

A. Well, it is my understanding that he attempted to do it; but, I received a letter from Mr. Tatum out of Atlanta that I had been terminated.

Q. Fired?

A. Yes, sir.

Q. And did you tell him about what—

A. I told Mr. Tatum personally. I went—

Q. What Mr. Reed had told you?

A. Yes, sir. I told Mr. Tatum what Mr. Reed had told me.

Q. What did he say to you then?

A. He told me he would contact Mr. Reed and
(p. 25) get back in touch with me.

Q. Did he?

A. Yes, sir, he did.

Q. And what did he tell you then?

A. He told me—he said, well the best thing he could see what he could do was to get me back to work as starting out as a new employee cubbing, that I'd lose all my seniority. He try to get me back like that. And that was in January of '80.

Q. This year?

A. Yes, sir.

Q. And did you make an application as a new employee?

A. Yes, sir. I went to Atlanta.

Q. And is that pending now?

A. Well, it's—I suppose it is. I don't know.

Q. Yes, sir.

How did you come to be in Birmingham today to make this statement?

A. Well, I felt that I—

Q. Did I contact you?

A. No, sir, you didn't.

(p. 26) Q. What happened?

A. Well, I figured I had been railroaded by the railroad.

Q. How did you feel about Mr. Woodrum?

A. Mr. Woodrum been railroaded by the railroad.

Q. And you had been instrumental in railroading him; hadn't you?

A. Yes, sir.

Q. With Mr. Piper and Mr. Fussel?

A. Right.

Q. And Mr. Smith?

A. I figured that Mr. Woodrum had been given a wrong deal by the railroad.

Q. Well, did Mr. Woodrum contact you or did you contact him?

A. I contacted Mr. Woodrum.

Q. When?

A. I called your wife Sunday. Sunday.

Q. Mr. Woodrum is sitting here now. You say you called his wife Sunday?

A. Yes, sir.

Q. And that would have been the 10th of May?

(p. 27) A. The 10th? Was it Mother's Day? 11th?

Q. No. I'm sorry.

A. 11th.

Q. It was not the 10th of May. Today is the—18th was on Sunday, Monday was the 19th and today is the 20th. So, you contacted Mr. Woodrum's wife day before yesterday?

A. Yes, sir, I did.

Q. And then you came to Birmingham yesterday?

A. Yes, sir.

Q. I was in Court trying a case. And it is now 22 minutes to 9:00 by my watch and you have met us here

this morning and made this statement to this young lady with a Court Reporting Company; is that right?

A. Yes, sir.

Q. Did anybody put any pressure on you to make this statement?

A. No, sir, didn't no—anyone—

Q. Has anybody paid you any money or anything like that?

A. Didn't no—anyone put any pressure on me to doing this. The pressure, really, what came upon (p. 28) me about this, well, really behind this case that—really what happened to Mr. Woodrum, I've been in a mental institution from pressure behind this.

Q. What mental institution did you go to?

A. I was in College Street Hospital in Macon, Georgia.

Q. When was that? How long after this statement that you made against Mr. Woodrum was that, if you've got a judgment? Let it stay on. The record stays on.

A. I'm trying to think when this was. It was in—if I'm not mistaken it was between September or October of—

Q. '78?

A. —'79.

Q. '79?

A. Yes, sir.

MR. BURGE: Okay. Thank you very much, Mr. Robinson.

END OF STATEMENT

(p. 29) CERTIFICATE

STATE OF ALABAMA)
JEFFERSON COUNTY)

I hereby certify that the above and foregoing Sworn Statement was taken down by me in stenotypy, and the questions and answers thereto were reduced to typewriting under my supervision, and that the foregoing represents a true and correct transcript of the Sworn Statement given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

/s/ Yvonne M. Pope
Commissioner

APPENDIX P

Q. State of Alabama—Jefferson County—Before me, a Notary Public, in and for said County and State, personally appeared Frank O. Burge, Jr., who is known to me, and who after being by me first duly sworn deposes and says as follows: I am a practicing lawyer in Birmingham, Alabama, who, for the past twenty years have represented many employees of the Southern Railway System who have been injured in the course of their employment while working for the Southern Railway System in and about Macon, Georgia. I specialize in Federal Employers Liability Act cases and I am very competent in the field of law. Among the many individuals I have represented in the past as attorney for claims of personal injuries sustained by employees as a result of the negligence of the Southern Railway System at Macon, Georgia, is Mr. Lonnie Woodrum. I am currently representing Mr. Woodrum for a claim against the Southern Railway System based on an injury caused him due to the negligence of the company. On March 16, 1978, I went to Macon, Georgia, to see Mr. Woodrum, Mr. Frank Nobles and Mr. J.W. Reid. While I was in Macon at that time, Eddie Lee Robinson, Sr., called me by telephone and wished to talk with me concerning an injury sustained by him at a time when he was a member of Mr. Lonnie Woodrum's switching crew at the Brosnan Yard. He called me while I was, with Mr. Nobles, Mr. Woodrum and Mr. Reid at the Hilton Hotel at Macon, Georgia, on that date, March 16, 1978, and he came to see me at the Hilton Hotel in Macon, Georgia, on that date while I was still with Mr. Nobles, Mr. Woodrum and Mr. Reid. At that time, Mr. Robinson made a detailed statement that I taped by tape recorded regarding facts of the accident and information about himself. During this statement, a contract of employment was filled out by me according to the information given by Mr. Robinson. The repetition of the information as to the dates of the accidents

and places of the accidents, Mr. Robinson's social security number, his birth date, his address and his telephone number occurred while I was filling out the contract of employment which Mr. Robinson signed at about the time the taped conversation evidences my telling him that I was going to handle his case for twenty-five percent. Subsequently my secretary, Mrs. Rebecca Askins, typed up the taped conversation and a type copy is attached to this affidavit as Exhibit "A". During the tape conversation, Mr. Robinsigned a contract of employment with me and a copy of that contract of employment is attached to this affidavit as Exhibit "B". A medical authorization was also signed by Mr. Robinson. It is Exhibit "C". Suit was filed on behalf of Mr. Robinson for the two accidents described in the taped statement and in the contract of employment, one having occurred on January 23, 1978, and the other having occurred on the ninth day of March, 1978. Both occurred in the Brosnan Yard of the Southern Railway System in Macon, Georgia. A copy of those suit papers are attached hereto and marked Exhibit "D". In addition, interrogatories were filed to the defendant Southern Railway Company, a corporation, and a request for production of documents was filed to the Southern Railway Company, a corporation, on behalf of Mr. Robinson. On April 5, 1978, a copy of the summons and complaint, (suit papers), the request for production and interrogatories were mailed to Mr. Robinson. My letter to him of that date is attached as Exhibit "E". Under date of April 24, 1978, three weeks after suit papers were sent Mr. Robinson by me, a letter was received from him wherein he denied that he had ever signed the contract attached hereto or ever employed me to file the suit I'd sent him three weeks before. He also stated in that letter that Mr. Woodrum did not try to get him to hire me as his lawyer and that he never knew of Mr. Woodrum's trying to get him to hire me as his lawyer. See the last sentence of that letter attached hereto and marked Exhibit "F".

At the time, Mr. Robinson called me on the telephone and asked to talk to me at the Hilton Hotel, I was already in conference with Mr. Nobles, Mr. Woodrum, and Mr. Reid relative to their pending claims against the Southern Railway Company. Mr. J. W. Reid, Mr. Frank Nobles and Mr. Lonnie Woodrum were present at the Hilton Hotel prior to the arrival of Mr. Robinson. Mr. Nobles, Mr. Woodrum and Mr. Reid were all present with me at the time Mr. Robinson arrived. Mr. Robinson did not arrive with Mr. Woodrum to talk with me since Mr. Woodrum was already present at the time Mr. Robinson arrived at my hotel room on March 16, 1978. I am a member of the United Transportation Union and have been since November 1961. I became a member of the United Transportion Union as a lawyer qualified and certified by the United Transportation Union, (it was the Brotherhood of Railroad Trainmen at the time I was admitted), to handle claims of injured employees against their railroad employers for personal injuries sustained on the job as a direct result of the negligence of their railroad employed. The United States Supreme Court, speaking in their opinion of Brotherhood of Railroad Trainmen vs. the State of Virginia, has stated rather clearly that railroad employees have a right to advise other railroad employees as to what lawyer an injured employee should hire to handle his claim against his railroad employer. This right is an individual right of each railroad man as well as the right of the railroad unions. The opinion of the Supreme Court of the United States says that Mr. Woodrum had the personal right to advise Mr. Robinson to hire a competent lawyer and to name such competent lawyer. This right is guaranteed by the constitutional guarantee of free speech and right of assembly. A copy of this Supreme Court opinion is attached hereto and marked Exhibit "G". This affidavit made in Birmingham, Alabama on this sixth day of May, 1978. Signed Frank O. Burge Junior.

Sworn to and subscribed before me on this the sixth day of May, 1978. Signed Dwight L. Driskill, Notary Public.

APPENDIX Q

SOUTHERN RAILWAY SYSTEM
Transportation Department
Macon, Georgia 31201

Leon H. Smith, Jr.
Superintendent

206 Terminal Station
Tel: (912) 743-5697

April 27, 1978 •
PR

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
CERTIFIED RECEIPT NUMBER 808843

Mr. L. M. Woodrum
Engineer
4420 Fairfax Drive
Macon, Georgia 31206

Dear Mr. Woodrum:

Arrange to attend an investigation to be held at the Ramada Inn North, Suite 166, 2400 Riverside Drive, Macon, Georgia, at 10:00 a.m., Monday, May 1, 1978.

In this investigation you will be charged with conduct disloyal and unbecoming an employee in that (1) you arranged for a meeting between Eddie Lee Robinson, a Switchman injured while on duty at Macon, Georgia, on March 9, 1978, and Plaintiff Attorney Frank Burge for the purpose of having Mr. Robinson retain such counsel in a suit against the Carrier under the Federal Employer's Liability Act, and (2) that you personally took Robinson to a hotel suite at the Hilton Hotel in Macon to meet with Mr. Burge for that purpose on or about March 15, 1978.

You may arrange to have present any witnesses and or representatives you so desire in accordance with the provisions of your current working agreement.

Yours very truly,

/s/ L. H. Smith, Jr.
Superintendent

Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1840

In The
Supreme Court of the United States
October Term, 1984

LONNIE M. WOODRUM,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER H. BUSH, JR.
HALL, BLOCH, GARLAND & MEYER
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Suite 1500
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June, 1985
Counsel of Record

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STATEMENT OF THE CASE

Respondent has steadfastly denied that its claim agent Bill Piper procured the perjury of Robinson.

Even though this case was decided on Summary Judgment, it was not the usual setting for Summary Judgment. Rather the trial courts decision dealt with statutory construction, with its own jurisdiction, and with whether the award of a Public Law Board was "*indisputably* without foundation in fact." Each of these is more an issue of law than of fact.

A brief chronology is in order.

(1) The meeting at the Hilton occurred on March 15, 1978.

(2) The hearing on the property at which Robinson allegedly lied occurred on May 16, 1978. The alleged lies had to do with Woodrum's conduct and for that reason he well knew whether the statements were lies. Woodrum was discharged for disloyalty, a proper ground for discharge under the collective bargaining agreement.

(3) The Public Law Board upheld Woodrum's dismissal on July 30, 1979.

(4) On May 20, 1980, Robinson (who now had employed Attorney Burge in his own F.E.L.A. case against Southern) gave an affidavit that he had lied at the hearing and that Mr. Piper had procured those lies. Woodrum admits that he knew of the recantation at this time.

(5) Piper died in August 1980.

(6) This law suit was filed on June 5, 1981—more than three years after Woodrum "knew" that Robinson had lied, nearly two years after the Public Law Board decisions, and more than one year after Woodrum admits that he knew everything.

There is no allegation that the original hearing conducted "on the property" was not properly conducted under the terms of the applicable collective bargaining agreement. The record demonstrates that petitioner was unrestricted in his proof and that he was afforded an opportunity to disprove the allegations of Mr. Robinson at the hearing.

The record also shows that the proceeding before the Public Law Board was conducted in accordance with its usual procedures and that it was composed as it customarily is—i.e. by one representative of labor, one of management, one neutral. There was no objection to the composition of the Board. To date petitioner has made no allegation that any member of the board was guilty of fraud or corruption.

———o———

REASONS FOR DENYING THE WRIT

INTRODUCTION

Contrary to petitioner's contention this case does not fall within any of the categories set forth in Supreme Court Rule 17 governing review or certiorari.

Petitioner has not cited a case from any other circuit in conflict with the decision in this case. He says there

is a conflict between this case and other cases applying the "indisputably without foundation in fact" rule, but in fact, this opinion applied that rule to this case. In all respects the Eleventh Circuit correctly applied well settled principles of law and there is no matter of sufficient gravity presented here to merit grant of the writ.

I.

The District Court lacked subject matter jurisdiction to review the Public Law Board decision on the grounds alleged by Petitioners.

Employment is generally at will with the employee having no recourse for his firing whether just or unjust. The Railway Labor Act was designed to reduce labor-management tensions that existed in the railroad industry. The original act provided for some review of management decisions. The machinery broke down because of delay caused by judicial review at the District Court level. Congress decided in 1966 to speed up the process by providing for substantial finality of the Public Law Board decisions with District Court review only upon narrow grounds.

It is well recognized that the scope of judicial review under the act is "among the narrowest known to the law" *Union Pacific v. Sheehan,* 439 US 89, 91-94, 99 S Ct 399, 401-2, 58 L.Ed.2d 354 (1978). The grounds stated in the act are

(1) "failure of the division to comply with the requirements of this chapter,"

(2) "for failure of the order to conform or, confine itself, to matters within the scope of the division's jurisdiction, or"

(3) "for fraud or corruption by a member of the division making the award"

A fourth ground recognized by several Court of Appeals decisions is that review may be had if the award is "*actually and undisputably* without foundation in reason and fact."

Both the District Court and the Court of Appeals considered each of these grounds and found each nonexistent.

As to the ground 3 both courts found that the language restricted review to fraud by a member of the tribunal as opposed to fraud by a party. This is what the language clearly says. The differences in this language and that of other similar statutes which give broader grounds of review merely show that Congress consciously selected the narrower language. *Merchants Dispatch v. System Federation,* 447 F Supp 799 is in agreement. Only fraud by a member of the division, as opposed to fraud by a party, was intended to be reviewable and there was no evidence or even allegation that the member knew of the fraud.

Nor did either court accept the notion that fraud by the railroad party should be imputed vicariously to the railroad representative on the board. It is well recognized that the Public Law Board is composed of two advocates and only one "neutral". *Stanton v. Delta Air Lines, Inc.* 669 F.2d 833, 837-8, (1st Circ. 1982); *Jones v. St. Louis - San Francisco Railway Co.* 728 F.2d 257, 260 (6th Circ. 1984). This partiality is fully expected and does not constitute fraud or corruption. In the absence of proof that the railroad representative actually knew of

the fraud (and there is no such proof here) knowledge of fraud by the party will not be attributed to the representative. See *Pitts v. National Railroad Passenger Service,* (N.D. Ill. 1985) #84 C 6486 decided March 8, 1985.

Regardless of whether ground 4 is simply a restatement of ground 2 or whether it is actually a fourth ground of review, it was considered by both the trial court and by the Court of Appeals.

Both courts determined that regardless of the effect of the recantation there was substantial evidence which continued to support the board's decision and which kept it from being "actually and indisputably without foundation in fact or law". For example, the undenied appearance of Mr. Woodrum's name and phone number on the back of Mr. Burge's business card and the giving of that card to Robinson shows more than testimony the role that Woodrum was playing for Burge.

In addition the court rejected the notion that recanting of testimony obliterates that testimony. The totality of the fact situation is summarized by the Court of Appeals showed an ample basis to believe that Robinson was telling the truth the first time. Furthermore, the testimony of Mr. Piper was never recanted and remains as substantive evidence.

All of this remains ample to support a finding that the award was not "indisputably without foundation in fact or law."

II.

Federal R. Civ. P. 60 (b) does not afford a basis of review of the Public Law Board decision.

F.R.C.P. 60(b)(3) seems to give a district court the authority to review a judgment obtained by "fraud . . . of an adverse party" but it "shall be made within one year of the judgment, order or proceeding was taken or entered." Yet, this action was not taken within one year of the Public Law board award or even within one year of the date he admitted "discovering" the fraud. For this reason Woodrum denominated his action as an "independent action".

Both the trial court and the Court of Appeals ruled that neither 60(b) in general nor the provision for independent actions contained in 60(b) were meant to give a district court jurisdiction over matters which it did not otherwise have. There is ample authority for this proposition cited by the Court of Appeals at Petitioner's App. 17. Both the trial court and the Court of Appeals recognized that Rule 60(b) did not authorize a district court to engraft an additional ground of review upon a congressional scheme allowing review only for specified grounds.

III.

There is no cause of action under 45 USC § 60.

45 USC § 60 voids any device intended to prevent employees of a common cause from furnishing information "*as to the facts incident to the injury or death of any employee*". It is a criminal statute and must be strictly construed. Woodrum was not disciplined for furnishing

information "as to the facts incident to the accident." The Court of Appeals correctly determined that there was no evidence even in Robinson's second version of the facts that § 60 was violated.

The Court of Appeals did not reach the statute of limitations problem on which the trial court ruled. Yet it is inescapable that if Southern violated § 60 it did so the moment it caused the hearing to be scheduled and that this occurred beyond the three year statute of limitations period. If it was the lying of Robinson that created the cause of action this occurred the moment Robinson lied because Woodrum had to know that Robinson's testimony about Woodrum's own conduct was false. This too falls outside the three year limitation period.

———o———

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

/s/ Walter H. Bush, Jr.
Hall, Bloch, Garland & Meyer
1500 Charter Medical Building
P. O. Box 5088
Macon, Georgia 31213

Attorneys for Respondent